SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 462

S. L. KILGORE, PETITIONER,

vs.

ALFRED A. McKETHAN, MERRILL P. BARBER, J. GLOVER TAYLOR, MARION G. NELSON, AND TRUSTEN DRAKE, JR., ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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[fol. 1]

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF FLORIDA, JACKSONVILLE DIVISION

Civil No. 2414-J

S. L. KILGORE, PLAINTIFF,

vs.

ALFRED A. McKETHAN, MERRILL P. BARBER, J. GLOVER TAYLOR, Marion G. Nelson, and Trusten Drake, Jr., individually and as members of the State Road Department of the State of Florida; Fuller Warren, individually and as Governor of the State of Florida; Florida Crushed Stone Company, a Florida corporation; Clarence N. Camp, III; B. M. Craig; C. V. Griffin; C. H. Doebler; C. B. Treadway and H. A. Bargeon, individually and as surviving trustees of Construction Equipment Company, a dissolved Florida corporation, DEFENDANTS.

COMPLAINT

Filed December 2, 1952.

1. This action arises under Section 1 of the Fourteenth Amendment to the Constitution of the United States; under the Acts of July 31, 1861, 12 Stat. 284 and April 20, 1871, 17 Stat. 13 (U. S. C. Title 8, Sec. 47 (3); under the Act of June 25, 1948, 62 Stat. 932 (U. S. C. Title 28, Sec. 1343); and under the Act of June 25, 1948, C. 645, 62 Stat. 701 (U. S. C. Title 18, Sec. 371), all of which will more fully appear hereinafter.

2. Plaintiff, who is now and was at all times mentioned in this suit, a citizen of the United States, was employed by defendant Florida Crushed Stone Company, a corporation organized and existing under the laws of the State of Flor-
[fol. 2] ida, in February of 1931, as a salesman. In April of 1931 plaintiff was promoted to Sales Manager of said company, which position he held continuously thereafter until December 3, 1949, at which time he was drawing a salary of Twelve Thousand ($12,000) Dollars per year. On

said date plaintiff was summarily discharged, as will more fully be shown hereinafter.

3. Florida Crushed Stone Company is and was at all times mentioned in this suit, a sales company existing for the sole purpose of marketing the crushed stone produced by Camp Concrete Rock Company and Consolidated Rock Products Division of the William P. McDonald Corporation. Said Florida Crushed Stone Company had, as its primary customers, those road contractors doing business with the State Road Department, so that the building of roads and bridges by the State of Florida furnished the major market for said crushed stone, and its gradations of size and quality had over the years been worked out and established in close cooperation with the technical staff of the State Road Department. Said Florida Crushed Stone Company was for many years, the only source of supply in Florida for large quantities of the various types of stone specified by the State Road Department in state road and bridge projects, and in 1949 it was the major producer in Florida of such stone, all of which was known to all of [fol. 3] the defendants herein.

4. In the May Democratic primaries of 1948, the defendant, Fuller Warren, received the Democratic nomination for the office of Governor of Florida, after the expenditure of many hundreds of thousands of dollars, and the defendant, C. V. Griffin, supplied more than One Hundred Fifty Thousand ($150,000) Dollars of said campaign fund. Fuller Warren assumed the office of Governor of Florida in January of 1949, and he thereupon appointed the defendant McKethan as Chairman of the State Road Department, and the defendants Barber, Taylor, Nelson and Drake as members thereof.

5. By virtue of the power and authority vested in him by the Constitution and laws of the State of Florida, the defendant Fuller Warren, was able from the time he assumed office to dictate the policies to be followed by the State Road Department, and he did so dictate those policies. He directed the Chairman of the State Road Department to so operate his department that Florida Crushed Stone Company would be forced to pay a portion of its income from sales of rock to contractors doing business with the State Road Department, to Construction Equipment Com-

[fol. 4] pany, for the purpose of paying back some of the huge campaign contributions that had been made to the Warren campaign by the defendant, C. V. Griffin, and others, and for other illegal purposes. A considerable portion of the funds used by the State Road Department for the payment of road contracts in Florida comes from the United States Treasury under that system whereby the Federal Government pays up to one-half of the cost of construction on designated Federal Highways, so that any action whereby the price of road contracts in Florida is unlawfully increased, necessarily results in an unlawful diversion of Federal aid funds as well as State funds, and amounts to a fraud upon the United States as well as a fraud upon the State of Florida.

6. The defendants and each of them in the early days and months of 1949 entered into the aforesaid continuing conspiracy to force illegal payoffs from Florida Crushed Stone Company and others, and to defraud the United States Government and the State of Florida by thus increasing illegally the cost of road construction in the State of Florida, and part and parcel of said continuing conspiracy was that Florida Crushed Stone Company would discharge plaintiff from his position as Sales Manager for Florida Crushed Stone Company, a position which he had [fol. 5] held for almost nineteen years, and which position would have continued indefinitely but for the wrongful conspiracy of the defendants herein set forth.

7. The defendants McKethan, Barber, Taylor, Nelson and Drake, acting in their official capacities as Chairman and members of the State Road Department and under the power and authority of the laws of the State of Florida, caused the issuance of an amendment to the "Standard Specifications for Road and Bridge Construction" adopted by the State Road Department on April 1, 1947, setting up an off-standard gradation requirement for cover materials (crushed stone or slag) which those defendants well knew that Florida Crushed Stone Company could not supply, having determined that fact in advance, and which had the practical effect of shutting out the plaintiff and Florida Crushed Stone Company from bidding on much State Road work and which would have, if continued, resulted in the complete elimination of Florida's largest crushed stone

concern from further competition on such projects. The purpose of closing the specifications in this manner was to soften up the Florida Crushed Stone Company and the plaintiff and to make them more receptive to the payoff arrangement which plaintiff and the then President of Florida Crushed Stone Company, one Henry Camp, now de-
[fol. 6] ceased, had both vigorously opposed.

8. To further implement the said directions of the defendant Fuller Warren that those doing business directly or indirectly with the State Road Department make "kickback" payments or otherwise pay tribute to the Governor or his friends and associates for the privilege of doing business with the State of Florida, the defendants, C. B. Treadway, and H. A. Bargeon, operated a Florida corporation known as Construction Equipment Company, of which the defendant Bargeon was President and the defendant Treadway was Secretary-Treasurer, which had as one of its purposes the collection of the aforesaid "kickbacks" or tribute from certain of those concerns selling materials for use on State projects, including the defendant, Florida Crushed Stone Company. Defendants Griffin and Doebler were materially interested in said corporation as stockholders, or otherwise. The Resident Agent of said corporation was the defendant C. B. Treadway and the corporation office was Room 20, Rutland Building, Orlando, Florida. Said corporation was dissolved by proclamation of the Governor of Florida on May 10, 1952, for failure to pay its corporate capital stock taxes, and the defendant Treadway and Bargeon are the sole surviving trustees of said dissolved corporation.

[fol. 7] 9. Both prior and subsequent to the closing of rock specifications by the defendant members of the State Road Department, which shut off defendant Florida Crushed Stone Company from the bulk of State Road business, as heretofore alleged, demands were made upon Florida Crushed Stone Company by defendant McKethan and by other defendants for the payment of ten cents per ton on rock sold to the State of Florida or to any contractor doing business with the State of Florida. When it became apparent to Henry Camp that said company, of which he was then President, would be out of business unless these

terms were met, he consented with the proviso that there would have to be an arrangement whereby Florida Crushed Stone Company would pay a "commission" of ten cents per ton on such orders, so that the books of the Florida Crushed Stone Company would not reflect an obviously illegal transaction, and so that said company could take an expense deduction on its Federal income tax returns. Pursuant to this condition, the defendants produced Construction Equipment Company as a broker through which such illegal payments could be made.

10. On or about September 19, 1949, and pursuant to the terms of the conspiracy heretofore alleged among the various defendants to this suit, Florida Crushed Stone Company entered into a contract with Construction Equipment Com-
[fol. 8] pany whereby the latter company was designated as Sales Agent for Florida Crushed Stone Company in the sale of rock in the State of Florida at a commission of ten cents per ton. Said contract was negotiated on behalf of Construction Equipment Company by defendants Treadway and Doebler, who assured the officials of Florida Crushed Stone Company that competition would be eliminated in Florida by dividing the state into three areas, and that the northern area of Florida would be assigned to Alabama Slag, the southern area of Florida would be assigned to East Coast Stone, and the territory in between, comprising the bulk of Peninsula Florida, would be reserved for Brooksville Stone, the product of Florida Crushed Stone Company. Said defendants Doebler and Treadway further assured the officials of Florida Crushed Stone Company that because of this arrangement, said company would be able to charge a higher price for its product than it had been previously receiving under competitive conditions. Said contract was then executed on behalf of Florida Crushed Stone Company by Henry W. Camp as its President and by the defendants, B. M. Craig, as its Secretary. Thereafter Florida Crushed Stone Company continued its own sales organization and it did not notify the trade of this arrangement, and up until the time of plaintiff's dismissal from his
[fol. 9] employment with Florida Crushed Stone Company, the Construction Equipment Company had not booked a single order of stone for Florida Crushed Stone Company,

although "commission" payments were made by said Florida Crushed Stone Company to Construction Equipment Company.

11. Because of the plaintiff's open hostility toward the entire "shakedown" arrangement and because he had fully and openly expressed to a number of the defendants that he did not believe that such tactics were right and that such tactics smacked of "gangsterism", pressure was exerted by the defendants upon Henry Camp, President of Florida Crushed Stone Company, and plaintiff's superior in said company, to discharge plaintiff. On December 3, 1949, plaintiff was summarily discharged by letter from Henry Camp at a time when the said Henry Camp was suffering from a complete nervous collapse. Said dismissal was brought about as a part and parcel of the aforesaid continuing conspiracy among all of the defendants to this suit and the insistent demands upon Henry Camp by the defendants that plaintiff be discharged. Said dismissal was arranged for and concurred in by the defendant, Clarence N. Camp, III, who is now President of Florida Crushed Stone Company and the brother of the said Henry Camp, deceased, [fol. 10] and defendant, B. M. Craig, then and now Secretary and Treasurer of said company.

12. Each of the defendants herein acting in concert and pursuant to the aforesaid continuing conspiracy to defraud the State of Florida, the Federal Government, and plaintiff, have conspired to deprive plaintiff of his right to engage in the gainful employment which he held prior to the time of his unjustified dismissal as Sales Manager of Florida Crushed Stone Company, all in direct contravention of the provisions of the Constitution and Statutes of the United States of America.

13. Thus, by reason of the aforesaid, the plaintiff was made sick and disabled and was seriously and permanently injured in that his entire nervous system was disrupted and impaired, and plaintiff suffered great pain and anguish of body and mind; and by reason of which the said plaintiff has become incapacitated from attending to any gainful occupation and has lost his earning power, and will be so incapacitated for the remainder of his life, and has lost his usual earnings for the remainder of his life; that by reason

of the aforementioned injuries, plaintiff has incurred and will incur in the future, expenses for medical and surgical treatment, all due to his damage and injury. That the said acts of the defendants herein complained of were malicious [fol. 11] and without justification and were done in utter and complete disregard of the plaintiff's rights, all to his damage as aforesaid.

Wherefore plaintiff demands judgment in the amount of Three Hundred Thousand ($300,000.00) Dollars.

(Sgd.) Thomas T. Cobb, Attorney for Plaintiff, 219 Magnolia Avenue, Daytona Beach, Florida.

In United States District Court

Motion to Dismiss—Filed December 22, 1952

Defendant Florida Crushed Stone Company, a Florida corporation, moves the court to dismiss this action on the following grounds, severally:

I

The complaint fails to state a claim against this defendant upon which relief can be granted.

II

It affirmatively appears that all parties are citizens of the State of Florida and that the action, notwithstanding the bare conclusions of law as alleged by the complaint, does not arise under the Constitution of the United States of [fol. 12] America or any law thereof and is not an action to recover damages because of the deprivation of any right or privilege of a citizen within the meaning of the acts specified in paragraph 1 of the complaint, wherefore this court lacks jurisdiction.

III

There is now pending in the Circuit Court in and for Duval County, State of Florida, a suit by the same plaintiff against the same defendants, involving the same subject matter and claiming the same relief, hence this court will

not, under established rules of comity, assume jurisdiction of this action.

(Sgd.) Wallace E. Sturgis, Suite 9-10 Marion Block, Ocala, Florida, Attorney for defendant Florida Crushed Stone Company.

IN UNITED STATES DISTRICT COURT

ORDER DISMISSING CAUSE AND FINAL JUDGMENT FOR DEFENDANTS—Filed December 30, 1952

[fol. 13] No. 2414-J Civil

S. L. KILGORE, Plaintiff,

vs.

ALFRED A. McKETHAN, et al., Defendants

This cause having been heard upon motions of the defendants Alfred A. McKethan, Merrill P. Barber, J. Glover Taylor, Marion G. Nelson, and Trusten Drake, Jr., Individually and as members of the State Road Department of the State of Florida; Fuller Warren, individually and as Governor of the State of Florida; Florida Crushed Stone Company, a Florida corporation; Clarence N. Camp, III; B. M. Craig; C. V. Griffin; C. H. Doebler; C. B. Treadway and H. A. Bargeon, individually and as surviving Trustees of Construction Equipment Company, a dissolved Florida corporation, to dismiss the same and the Court having heard argument of counsel and having examined the pleadings, finds that no Federal jurisdiction exists by virtue of either of the Federal Statutes cited in the complaint, or by virtue of the Constitution of the United States, or upon any other ground. Plaintiff has cited Title 8 U. S. C. A. Sections 41 and 43, and Title 28 U. S. C. A. Section 1331 in further support of his position. The Court specifically finds that none of these sections confer jurisdiction upon this Court in the causes made out in plaintiff's complaint. It is thereupon [fol. 14] Considered, Ordered and Adjudged that said cause be and the same is hereby dismissed, that the plain-

tiff, S. L. Kilgore take nothing by his said suit, and that each of said defendants go hence without day.

Done and Ordered at Jacksonville, Florida, December 30, 1952.

(Sgd.) Bryan Simpson, United States District Judge.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed January 28, 1953

[Title omitted]

Notice is hereby given that S. L. Kilgore, plaintiff above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final Order granting defendants' Motion to Dismiss for lack of Federal jurisdiction, entered in this action on the 30th day of December, A. D. 1952.

[fol. 15] Dated this 28th day of January, A. D. 1953.

(Sgd.) Thomas T. Cobb, Attorney for Appellant, 219 Magnolia Avenue, Daytona Beach, Florida.

IN UNITED STATES DISTRICT COURT

APPELLANT'S DESIGNATION OF CONTENTS OF RECORD—Filed January 28, 1953

To the Honorable Edwin R. Williams, Clerk of the United States District Court for the Southern District of Florida:

Pursuant to Rule 75 (a) of the Federal Rules of Civil Procedure, appellant designates the following portions of the record to be contained in the record on appeal in the above entitled action to the United States Court of Appeals for the Fifth Circuit:

1. Complaint.
2. Motion to Dismiss of Florida Crushed Stone Company. (All other defendants having filed substantially similar motions.)

3. Order of District Court dated December 30, 1952.
4. Notice of Appeal, with date of filing.
5. This designation.
6. Designation by Appellees of additional matters to be included in the record, if any is filed.
[fol. 16] 7. Statement of points which appellant intends to rely upon appeal.

Dated this 28th day of January, A. D. 1953.

(Sgd.) Thomas T. Cobb, Attorney for Appellant, 219 Magnolia Avenue, Daytona Beach, Florida.

IN UNITED STATES DISTRICT COURT

STATEMENT OF POINTS RELIED UPON—Filed January 28, 1953

[Title omitted]

Appellant, plaintiff above named, states that the points on which he intends to rely on the appeal in this action are as follows:

1. The Court erred in holding that no basis for Federal jurisdiction of this cause is stated in the Complaint.
2. The Court erred in granting Appellee's Motion to Dismiss.

Dated this 28th day of January, A. D. 1953.

(Sgd.) Thomas T. Cobb, Attorney for Appellant, Daytona Beach, Florida.

[fol. 17] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 18] STATE OF FLORIDA,
County of Volusia, ss:

I, Thomas T. Cobb, attorney for the appellant in the foregoing cause, certify that I have this day served opposing counsel with three copies of the foregoing record in accord-

ance with the requirements of Rule 23 (11), of the rules of the United States Court of Appeals for the Fifth Circuit.

Thomas T. Cobb.

Sworn to and subscribed before me this 4th day of March, A. D. 1953. Ellie S. Lawrence, Notary Public, State of Florida at Large. My Commission Expires 8-17-55. (Seal.)

[fol. 19] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14494

S. L. KILGORE,

versus

ALFRED A. McKETHAN, ET AL.

ARGUMENT AND SUBMISSION—June 3, 1953

On this day this cause was called, and after argument by Thomas T. Cobb, Esq., for appellant, and Doyle E. Carlton, Esq., Wallace E. Sturgis, Esq., and Weldon G. Starry, Esq., for appellees, was submitted to the Court.

• • • • • • •

[fol. 20] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14494

S. L. KILGORE, APPELLANT,

versus

ALFRED A. McKETHAN, ET AL., APPELLEES.

Appeal from the United States District Court for the Southern District of Florda

OPINION—June 26, 1953

Before HUTCHESON, Chief Judge, and RUSSELL and STURM, Circuit Judges.

STURM, Circuit Judge: This action, based upon 8 U.S.C.A. 47(3),[1] is brought to redress, by the recovery of damages, an alleged conspiracy to deprive plaintiff of civil rights se- [fol. 21] cured to him by the Fourteenth Amendment to the Constitution of the United States. Federal jurisdiction is asserted under 28 U.S.C.A. 1343(3) and 28 U.S.C.A. 1331. The district court dismissed the complaint for lack of federal jurisdiction, without leave to amend, and plaintiff appeals.

In substance, the complaint charges that since 1931 plaintiff had been employed by, and at the time of his discharge hereinafter mentioned was the sales manager of, Florida Crushed Stone Company, a corporation organized for the sole purpose of marketing crushed stone produced by other companies in Florida. For many years Florida Crushed Stone Company was the only source of supply in Florida for various types of crushed stone used by the Florida State Road Department in the construction of roads, and in 1949 said company was the major "producer" in Florida of such stone.

The complaint further alleges that the Governor of Flor-

[1] The complaint also alleges that the action arises under 18 U. S. C. A. 371, but that section refers only to criminal conspiracies against the United States or its agencies.

ida who took office in January, 1949, directed the chairman of the State Road Department, whom said Governor had appointed, to so operate his department that the Florida Crushed Stone Company would be forced to pay to certain contractors doing business with the State Road Department a portion of its income from the sale of rock to them, in order to reimburse such contractors for large contributions made by them to defray the expense of said governor's campaign for office.

The complaint then alleges that the defendants, who are the chairman and members of the Florida State Road De- [fol. 22] partment taking office in January, 1949, the Governor, several producers of crushed rock, and others, entered into a continuing conspiracy to carry out said plan, a part of which was that plaintiff should be discharged from his position as sales manager of Florida Crushed Stone Company, because he would not assent to the plan, and that on December 3, 1949, he was for that reason summarily discharged from such employment, all of which, plaintiff charges, violates his civil rights secured by the Fourteenth Amendment, for which he seeks damages.

We find nothing in the charges of the complaint which, if true, would constitute a violation of plaintiff's federally secured civil rights. Stripped to its basic essentials, plaintiff's complaint is that, as a result of an alleged conspiracy to raise funds for political purposes, he was wrongfully discharged from his employment because he would not assent to the plan. The acts of which plaintiff complains would, at most, amount to no more than an ordinary tort, remediable under state law. It is not alleged that plaintiff was deprived of his right to work, but only that he was wrongfully discharged from a particular job. The Fourteenth Amendment does not have the effect of taking into federal control the protection of private rights against invasion of individuals. *Snowden* v. *Hughes*, 321 U. S. 1, 88 L. Ed. 497. Whatever plaintiff's rights may be in the premises, they do not arise from the Constitution or laws of the United States. *Ferrer v. Fronton Exhibition Co.*, 5 Cir., 188 Fed. (2) 954; *Love v. Chandler*, 8 Cir., 124 Fed. (2) 785; *Simpson v. Geary*, [fol. 23] 204 Fed. 507, 512; *Hodges v. United States*, 203 U. S. 1, 51 L. Ed. 65; *Collins v. Hardyman*, 341 U. S. 651, 95 L. Ed. 1253.

Even under the doctrine of *Bell v. Hood*, 327 U. S. 678, 90 L. Ed. 939, 13 A.L.R. (2) 383, the mere assertion by a plaintiff that he is entitled to a federal remedy does not satisfy federal jurisdictional requirements, when the facts alleged do not support the assertion. *McGuire v. Todd*, 5 Cir., 198 Fed. (2) 60, cert. den. 344 U. S. 835, 97 L. Ed.——; *Screven County v. Brier Creek Club*, 5 Cir., 202 Fed. (2) 369; *Whittington v. Johnston*, 5 Cir., 201 Fed. (2) 810; *Yglesias v. Gulf Stream Park Assn.*, 5 Cir., 201 Fed. (2) 817, cert. den. ——U. S. ——, 97 L. Ed. ——.

As the complaint wholly and unamendably fails to state a claim under 8 U.S.C.A. 47(3), or any other federal law, the complaint was properly dismissed.

Affirmed.

[fol. 24-25] In the United States Court of Appeals

No. 14494

S. L. Kilgore,

versus

Alfred A. McKethan, et al.

Judgment—June 26, 1953

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, S. L. Kilgore, be condemned to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

• • • • • • •

[fol. 26] IN UNITED STATES COURT OF APPEALS

PETITION FOR RE-HEARING—Filed July 16, 1953

To the United States Court of Appeals for the Fifth Circuit and the Judges thereof:

Appellant in the above-entitled cause, presents this, his Petition for a Re-hearing of the above-entitled cause, and in support thereof, respectfully shows:

I

That the court overlooked and failed to consider the allegations of appellant's complaint wherein he alleged that the appellees, by their conspiratorial actions against him, completely and permanently injured him "and by reason of which the said plaintiff has become incapacitated from attending to any gainful occupation and has lost his earning power, and will be so incapacitated for the remainder of his life, and has lost his usual earning powers for the remainder of his life . . ." which appellant contends is an allegation that appellant has been deprived of his right to work and not just deprived of his employment in one particular job.

II

That the court in its opinion and judgment overlooked and failed to consider the appellant's contention that he has, by state action, been deprived of property without due process of law, in contravention of the express provisions of the Fourteenth Amendment to the United States Constitution.

For the reasons stated above, petitioner requests that a rehearing be granted and that on such re-hearing the judgment of this court be reversed and the judgment of the United States District Court for the Southern District of [fol. 27] Florida dismissing this cause for lack of Federal jurisdiction, be reversed.

Dated this 15th day of July, A. D. 1953.

Respectfully submitted, Cobb & Cole, by Thos. T. Cobb, Attorneys for Appellant, 219 Magnolia Avenue, Daytona Beach, Florida.

S. L. Kilgore, Appellant herein, by his attorney, hereby certifies that the foregoing petition for re-hearing is not presented for the purpose of delay or vexation, but is, in the opinion of counsel, well-founded in law and proper to be filed herein.

Dated July 10, 1953.

Cobb & Cole, by Thos. T. Cobb, Attorneys for Appellant.

[fol. 28] IN UNITED STATES COURT OF APPEALS

ORDER DENYING REHEARING—August 13, 1953

[Title omitted]

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

[fols. 29-30] UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Title omitted]

PETITION FOR LEAVE TO FILE EXTRAORDINARY PETITION FOR REHEARING, AND TO RECALL MANDATE PREVIOUSLY ISSUED HEREIN—Filed October 5, 1953

[fol. 31] To the United States Court of Appeals for the Fifth Circuit and the Judges thereof:

Comes now the appellant in the above-entitled cause and respectfully petitions this Honorable Court for leave to file his extraordinary petition for rehearing in the above-entitled cause, and his petition to recall the mandate of this Honorable Court previously entered and sent down in this cause, and for grounds for said petition, respectfully shows unto the Court as follows:

I

That this Honorable Court, in its consideration of this cause, misconstrued the facts as alleged in the bill of complaint herein, and misstated the same, as shown in a copy

of the proposed extraordinary petition for rehearing which is attached hereto and made a part hereof.

II

That this Honorable Court, in its consideration of this cause, overlooked and failed to consider material allegations of fact contained in appellant's complaint in this cause, which conclusively show that appellant has been deprived of his right of employment, as secured to him by the Fourteenth Amendment to the Constitution of the United States; as appears in the copy of the extraordinary petition for rehearing, attached hereto and made a part hereof.

III

That a reconsideration of the things and matters alleged and set out in the said copy of said extraordinary petition [fol. 32] for rehearing is necessary and essential to prevent an injustice to this petitioner.

Dated this 2nd day of October, A. D. 1953.

Respectfully submitted, Cobb & Cole, by Thomas T. Cobb, Attorneys for Appellant, 219 Magnolia Avenue, Daytona Beach, Florida.

S. L. Kilgore, Appellant herein, by his attorney, hereby certifies that the foregoing petition is not presented for the purpose of delay or vexation, but is, in the opinion of counsel, well-founded in law and proper to be filed herein.

Dated Oct. 2nd, 1953.

Cobb & Cole, by Thomas T. Cobb, Attorneys for Appellant.

[fol. 33] UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14,494

S. L. KILGORE, Appellant,

vs.

ALFRED A. McKETHAN, et al., Appellees

Extraordinary Petition for Rehearing

To the United States Court of Appeals for the Fifth Circuit and the Judges Thereof:

Comes now the appellant in the above-entitled cause and files this his extraordinary petition for rehearing and for grounds therefor, respectfully shows unto the Court as follows:

I

This Honorable Court grievously misunderstood and misinterpreted the facts alleged in appellant's complaint in the following material particulars:

(a) On page 2 of its opinion affirming the lower court's decision in this cause, this Court, speaking through Honorable Justice Sturm, makes the following statement of facts in this cause:

> "The complaint further alleges that the Governor of Florida who took office in January, 1949, directed the chairman of the State Road Department, whom said [fol. 34] Governor had appointed, to so operate his department that the Florida Crushed Stone Company would be forced to *pay to certain contractors* doing business with the State Road Department a portion of its income from the sale of rock to them, in order to *reimburse such contractors for large contributions made by them* to defray the expense of said governor's campaign for office." (Emphasis supplied.)

Nowhere in said complaint is the allegation ever made that any payments were made or were to be made to any

contractors for any purpose whatsoever, nor is it anywhere alleged that any contractors had made any contributions to the governor's campaign for his office. Instead, it is directly alleged that the payments were to be made to a corporation known as Construction Equipment Company. The said Construction Equipment Company was organized by the defendants. Said company, pursuant to the alleged conspiracy, after Florida Crushed Stone Company and its president had capitulated to the same, entered into a contract with Florida Crushed Stone. Under the terms of the contract between the Construction Equipment Company and the Florida Crushed Stone Company, the Construction Equipment Company was supposed to be Florida Crushed Stone's sales agent. For this service, Construction Equipment Company would receive from Florida Crushed Stone 10¢ a ton on all rock sold to the State or to any contractor doing business with the State. It is further directly alleged that this above contract between Construction Equipment Company and Florida Crushed Stone Company was a mere sham. Construction Equipment Company sold no rock for Florida Crushed Stone Company. Florida Crushed Stone Company retained and maintained its original sales force which continued to sell its products. The entire purpose [fol. 35] of this contract was to make Florida Crushed Stone's books appear in such a way that they had paid a legal sales commission rather than an unlawful kickback or bribe. It is further alleged that the Construction Equipment Company was organized by and that the stock was owned by the defendants in this case and, consequently, it is only reasonable to deduce that its actions were actually the actions of these defendants.

The above-quoted portion of the court's opinion is further wrong in that it states that the contractors had made large contributions to defray the expenses of the governor's campaign. This is nowhere alleged in this complaint, the direct allegation being that C. V. Griffin had made a large contribution.

(b) The Court further misconceived and misstated the facts alleged in the complaint herein in the next paragraph

of its opinion on page 2 thereof, where the following statement appears:

> ". . . the Governor, *several producers of crushed rock,* and others, entered into a continuing conspiracy to carry out said plan . . ." (Emphasis supplied.)

Nowhere in appellant's complaint can the allegation be found that any producers of crushed rock entered into this conspiracy.

II

This Honorable Court, in its consideration of this cause, overlooked and wholly failed to consider material allegations of fact contained in appellant's complaint which show he was deprived of the right to work, which right is secured [fol. 36] to him by the Fourteenth Amendment to the Constitution of the United States and which deprivation is the basis for appellant's contention of Federal jurisdiction in this cause, in the following particulars:

On page 3 of the Court's opinion, as above stated, the following statement appears:

> "Plaintiff's complaint is that, as a result of an alleged conspiracy to raise funds for political purposes, he was wrongfully discharged from his employment because he would not assent to the plan. The acts of which plaintiff complains would, at most, amount to an ordinary tort remediable under state law. *It is not alleged that plaintiff was deprived of his right to work but only that he was discharged from the particular job.*" (Emphasis supplied.)

Quite aside from appellant's allegation of permanent, total disability resulting from the actions of the defendants, the following allegations appear in his complaint:

This complaint directly alleges that these defendants, through the co-defendants and co-conspirators Doebler and Treadway, assured the officials of the Florida Crushed Stone Company that the following had been accomplished by these defendants with regard to crushed stone and other rock materials in Florida: The State of Florida had been divided into three areas. The northern area of Florida

would be assigned to Alabama Slag, the southern area of Florida to the East Coast Stone Company and the territory in between, comprising the bulk of peninsula Florida, be reserved for the products of the Florida Crushed Stone Company. This arrangement would eliminate competitive bids and would enable the Florida Crushed Stone Company to charge higher prices for its products.

[fol. 37] It is perfectly clear that if the plaintiff Kilgore was objectionable as the sales manager of the Florida Crushed Stone Company because of his resistance to this alleged conspiracy, he would be objectionable as an employee in a like capacity in any of the other big stone companies doing business with the State of Florida. It is alleged that this plaintiff had been in this business for 19 years and it is reasonable to assume that this is probably his only means of livelihood for which he is adequately trained. It is submitted that the test on motion to dismiss was whether or not this complaint wholly failed to state a cause of action and it seems reasonable that the allegations set out in this complaint and reviewed above are such that the conclusion is inescapable that the complaint shows, if it is believed, that S. L. Kilgore was deprived of his right to work as sales manager of the Florida Crushed Stone Company or in a similar capacity for any other similar business desiring or needing his services in the State of Florida as a result of this alleged conspiracy.

For the reasons stated above, petitioner requests that a rehearing be granted and that on such rehearing the judgment of this court be reversed and the judgment of the United States District Court for the Southern District of Florida dismissing this cause for lack of Federal jurisdiction, be reversed.

[fol. 38] Dated this 2nd day of October, A. D. 1953.

Respectfully submitted, Cobb & Cole, by Thomas T. Cobb, Attorneys for Appellant, 219 Magnolia Avenue, Daytona Beach, Florida.

S. L. Kilgore, Appellant herein, by his attorney, hereby certifies that the foregoing petition for rehearing is not presented for the purpose of delay or vexation, but is, in

the opinion of counsel, well-founded in law and proper to be filed herein.

Dated October 2nd, 1953.

Cobb & Cole, by Thomas T. Cobb, Attorneys for Appellant.

[fol. 39] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ORDER DENYING PETITION FOR LEAVE TO FILE EXTRAORDINARY PETITION FOR REHEARING AND TO RECALL THE MANDATE—Entered October 26, 1953

Before Hutcheson, Chief Judge, and Russell and Sturm, Circuit Judges

Per CURIAM:

Upon consideration of the petition for leave to file extraordinary petition for rehearing, and to recall the mandate previously issued, a majority of the judges herein determining the cause so finding and adjudging that the petition should be denied, it is so Ordered and the petition Denied.

[fol. 40] Clerk's Certificate to foregoing transcript omitted in printing.

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HAROLD B. WILLEY, CL

SUPREME COURT OF THE UNITED STATES

FALL TERM, A. D. 1953

No. 462

S. L. KILGORE,

Petitioner,

-vs-

ALFRED A. McKETHAN, ET AL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO U. S. COURT OF APPEALS FOR FIFTH CIRCUIT AND BRIEF IN SUPPORT

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SUPREME COURT OF THE UNITED STATES

FALL TERM, A. D. 1953

No._____

S. L. KILGORE,	)	PETITION FOR
Petitioner,	)	WRIT OF CERTI-
	)	ORARI TO THE
-vs-	)	U. S. COURT OF
	)	APPEALS FOR
ALFRED A. McKETHAN, ET AL,	)	THE FIFTH CIR-
Respondents.	)	CUIT.

To the Honorable Earl Warren, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I. Summary Statement of Matter Involved.

This is an action brought in the Federal District Court for the Southern District of Florida by S. L. Kilgore, the petitioner herein, against Alfred A. McKethan, Merrill P. Barber, J. Glover Taylor, Marion G. Nelson, and Trusten Drake, Jr., individually and as members of the State Road Department of the State of Florida; Fuller Warren, individually and as Governor of the State of Florida; Florida Crushed Stone Company, a Florida corporation; Clarence N. Camp III; B. M. Craig; C. V. Griffin; C. H. Doebler; C. B. Treadway and H. A. Bargeon, individually and as surviving trustees of Construction Equipment Company,

a dissolved Florida corporation, respondents herein, for damages suffered by petitioner as the result of an unlawful conspiracy on the part of the respondents.

The Complaint alleges that for eighteen years prior to December 3, 1949, plaintiff was sales manager of Florida Crushed Stone Company, a sales company existing for the sole purpose of marketing crushed stone produced by others, and with road contractors doing business with the State Road Department of Florida as its primary customers. The respondent, Fuller Warren, was elected Governor of Florida in 1948, with the assistance of the respondent, C. V. Griffin, who contributed in excess of One Hundred Fifty Thousand ($150,000.00) Dollars to the Warren campaign. Fuller Warren then appointed the respondents McKethan, Barber, Taylor, Nelson, and Drake as Chairman and members respectively of State Road Board, and directed the said McKethan to so operate the State Road Department that Florida Crushed Stone Company would be forced to pay tribute on all sales of rock to contractors doing business with the State, to Construction Equipment Company. The latter corporation was set up by respondent, C. V. Griffin, for the purpose of recapturing the latter's contributions to the Warren campaign.

Petitioner strenuously objected to the aforesaid illegal arrangement, so the respondent members of the State Road Board changed rock specifications to shut Florida Crushed Stone out of the market for the purpose of bringing that corporation into line, and demanded the removal of petitioner as sales manager thereof. As a result of the aforesaid change in specifications, and the pressure brought to bear upon the company and its officers, Florida Crushed Stone Company joined with the conspirators and signed a contract to pay ten cents (10¢) per ton on all rock sales

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to the said Construction Equipment Company and on December 3, 1949, summarily fired petitioner from his Twelve Thousand ($12,000.00) Dollar per year job as sales manager. Petitioner, by reason of the pressure generated by this conspiracy and climaxed by the shock of his summary dismissal, was severely and permanently injured in that his entire nervous system was disrupted and he was incapacitated from attending to any gainful occupation for the remainder of his life.

Motions to dismiss the Complaint were filed by respondents, and were sustained by the District Court on the ground that no Federal jurisdiction existed.

Petitioner perfected his appeal to the United States Court of Appeals for the Fifth Circuit, and that court sustained the ruling of the District Court in an opinion appearing in 205 Fed. (2d) 425. Petitioner duly filing his petition for rehearing which was denied on August 13, 1953. On October 2, 1953, petitioner filed his petition in said court for leave to file an Extraordinary Petition for Rehearing and to Recall the Mandate, which petition was denied on October 26, 1953.

II. Jurisdictional Statement.

The constitutional and statutory provisions believed to sustain the jurisdiction of this court are Amendment XIV of the Constitution of the United States; 8 U. S. Code § 43; 28 U. S. Code § 1343; and 28 U. S. Code § 1331, the pertinent portions of which provide as follows:

AMENDMENT XIV

"Section 1. . . . nor shall any State deprive any person of life, liberty, or property without due

process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

8 U. S. CODE § 43

"CIVIL ACTION FOR DEPRIVATION OF RIGHTS. Every person who, under color of any statute, ordinance, regulation, custom or usage, or any State . . . subjects or causes to be subjected, any citizen of the United States . . . to deprivation of any rights, privileges and immunities secured by the constitution and law, shall be liable to the party injured in an action at law.

28 U. S. CODE § 1343

"CIVIL RIGHTS—The district court shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

"(3) To redress the deprivation, under color of any State law, statute, or ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of the Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

28 U. S. CODE § 1331

"The district court shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or values of $3,000.00 . . . and arises under the Constitution . . . "

The date of the judgment sought to be reviewed by certiorari is June 26, 1953 (Petitions for Rehearing denied August 13, 1953 and October 26, 1953), and the date of this application for certiorari is November 10, 1953.

III. Questions Presented.

1. Does a complaint comply with Rule 8 of the Federal Rules of Civil Procedure where it is alleged (1) that de-

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fendants, by conspiratorial action under color of state law, have caused plaintiff to be deprived of the right to work secured to him by Amendment XIV and that defendants have thus rendered themselves liable in damages to plaintiff, under 8 U. S. Code § 43; (2) that jurisdiction exists by virtue of 28 U. S. Code § 1343 (3); and (3) to demand judgment for damages?

2. Where a Complaint is so drawn as to claim a right to recover under 8 U. S. Code § 43, does jurisdiction under 28 U. S. Code § 1343 (3) exist?

3. Is a Federal question presented by a Complaint, which alleges: (1) that defendants, some of whom are state officials and employees, conspired to coerce corporations selling crushed rock to contractors doing business with State Road Department to pay kickbacks to be used to reimburse contributors to the campaign funds of one of the defendant state officials; (2) that as part of the conspiracy, defendants caused the discharge of plaintiff, sales manager of said corporation, because plaintiff opposed such kickback; (3) that as part of the conspiracy, the defendants who were state officials and employees misused their official powers to procure the discharge of plaintiff?

IV. Reasons Relied On for the Allowance of the Writ.

1. The decision of the Court of Appeals as to the Fourteenth Amendment, by holding that petitioner's private rights were invaded by "individuals", is a decision of a Federal question in a way probably in conflict with applicable decisions of this court, and would leave petitioner and others similarly situated at the mercy of corrupt state officials.

EED THRU

2. The decision of the Court of Appeals as to the deprivation of petitioner's rights, by holding that, in the circumstances alleged in the Complaint, plaintiff was not deprived of his right to work, involves an important question of federal law which has not been, but should be settled by this court.

3. The opinion of the Court of Appeals, indicates that the members of the court misconstrued and misunderstood the material facts as alleged in the Complaint, as is more particularly set forth in petitioner's Extraordinary Petition for Rehearing addressed to the court below and contained in the Transcript submitted herewith.

4. The decision of said Court of Appeals, by holding that the Complaint wholly and unamendedly fails to state a claim under any Federal law, so far departs from the accepted and usual course of judicial proceedings, or so far sanctions such a departure by the District Court, as to call for an exercise of this court's power of supervision.

WHEREFORE, your petitioner prays that a Writ of Certiorari issue to the Court of Appeals for the Fifth Circuit to the end that the errors aforesaid may be corrected by this court.

DATED November 10, 1953.

B. DOWNEY RICE
Washington, D. C.

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SUPREME COURT OF THE UNITED STATES

FALL TERM, 1953

No.____

S. L. KILGORE,
Petitioner and Appellant Below,

-vs-

ALFRED A. McKETHAN, ET AL,
Respondents and Appellees Below.

I. Opinions of Courts Below

The opinion in the Circuit Court of Appeals is reported in 205 Fed. 2nd 425.

II. Jurisdiction

1. The date of the judgment to be reviewed is June 26, 1953. The Petition for Rehearing was denied August 13, 1953, and the Petition for Leave to File Extraordinary Petition for Rehearing, and to Recall Mandate was denied October 26, 1953.

2. The Constitutional and Statutory provisions believed to sustain the jurisdiction of this Court are Amendment XIV of the Constitution of the United States; 8 U. S. Code, Sec. 43; 28 U. S. Code, Sec. 1343 and 28 U. S. Code, Sec. 1331.

3. Petitioner, hereinafter sometimes designated as Plaintiff, filed his complaint on December 2, 1952. He named as Defendants the Chairman and members of the State Road Department of Florida, individually and in their official capacity; Fuller Warren, individually and as Governor of the State of Florida; Florida Crushed Stone Company, a Florida corporation; and the trustees of Construction Equipment Company, a dissolved Florida corporation. The essential facts alleged:

That defendants conspired to coerce Florida Crushed Stone Company, selling crushed rock to road contractors doing business with the State, to pay kickbacks to be used to reimburse contributors to the campaign funds of Governor Warren; that plaintiff, Sales Manager of Florida Crushed Stone, objected; that defendants who were State officials used their official powers to force the discharge of plaintiff and thus insure the payment of the kickbacks. Plaintiff seeks damages for his discharge—for the deprivation of his rights under color of state law.

The U. S. District Court, Southern District, Florida, Jacksonville Division, entered an Order and Judgment December 30, 1952 to the effect that it did not have jurisdiction. The Fifth Circuit Court of Appeals affirmed "as the Complaint wholly and unamendably fails to state a claim under . . . any . . . Federal law . . ." The Circuit Court of Appeals refused to rehear the case and this Petition for Writ of Certiorari followed.

4. The cases believed to sustain said jurisdiction are as follows:

a. *Bell v. Hood*, 327 U. S. 678.

b. *Cobb v. City of Malden*, 202 Fed. 2nd 701.

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c. *Picking v. Pennsylvania R. Co.*, 151 Fed. 2nd 240.
d. *Screws v. U. S.*, 323 U. S. 91.
e. *Truax v. Raich*, 239 U. S. 33.
f. *United States v. Classic*, 313 U. S. 299.
g. *Yick-Wo v. Hopkins*, 118 U. S. 356.

III. Statement of the Case

This has already been stated in the preceding petition for review by certiorari under "I" of said Petition, which is hereby adopted and made a part of this brief.

IV. Specification of Errors

The Circuit Court of Appeals erred in affirming the District Court in holding that no basis for Federal jurisdiction of this cause is stated in the complaint.

Summary of Argument

1. *Gravamen of Complaint.* The complaint alleges: that respondents, some of whom were state officials and employees, conspired to coerce a corporation selling crushed rock to road contractors doing business with the State to pay kickbacks to be used to reimburse contributors to the campaign funds of one of the defendant State officials; that, as part of the conspiracy, respondents caused the discharge of petitioner, Sales Manager of the corporation in question because petitioner opposed his company's paying such kickbacks; and that, as part of the conspiracy, the respondents who were State officials and employees misused their official powers to procure the discharge of petitioner and thus to insure collection of the kickback from his company by changing specifications so as to make the stone supplied by plaintiff's company ineligible for use on many State projects. That co-conspirators assured officials

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of Florida Crushed Stone Company that, with regard to crushed stone, the state had been divided into three areas. The Northern area assigned to Alabama Slag, the Southern area to East Coast Stone Company, the territory in between, comprising the bulk of Peninsular Florida, being reserved for the products of Florida Crushed Stone Company. This would eliminate competitive bidding. Kilgore, objectionable, as Sales Manager of Florida Crushed Stone Company, would be objectionable as an employee of any of the other big Stone Companies doing business with the State of Florida.

Petitioner suffered severe nervous and physical injury which *permanently* disabled him from pursuing *any* gainful employment and seeks damages for his discharge—for the deprivation of his right to work and his property, i.e. his job and his Twelve Thousand ($12,000.00) Dollars salary, without due process of law and under color of state authority.

2. *The Complaint Complies Substantially with Rule 8 of the Federal Rules of Civil Procedure.* It was designed (1) to state a claim that defendants (respondents) by conspiratory action under color of State law, have caused plaintiff (petitioner) to be deprived of the right to work secured to him under Amendment XIV and that defendants (respondents) have thus rendered themselves liable in damages to plaintiff (petitioner) under 8 U. S. Code Sec. 43; (2) to point out that the jurisdiction of such a claim is conferred upon this Court by 28 U. S. Code Sec. 1343 (3); and (3) to demand judgment for damages. *Polk Company v. Glover,* 305 U. S. 5, 59 Sup. Court 15, 83 Law. Ed. 6; *Borden's Farm Products Co. v. Baldwin,* 293 U. S. 194, 55 Sup. Court 187, 79 Law Ed. 281; *Picking v. Pennsylvania*

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R. Co., 151 Fed. 2nd 240 (3rd Circuit 1945); *Bell v. Hood*, 327 U. S. 678; 54 Am. Jur. U. S. Cts. Sec. 45 page 700.

3. *Jurisdiction Under 28 U. S. Code Sec. 1343 (3) Clearly Exists if the Complaint States a Cause of Action Under 8 U. S. Code Sec. 43.* This proposition, if authority is needed, is established by *Picking v. Pennsylvania R. Co.*, supra; *Hague v. C. I. O.*, 59 Supreme Court 954, 307 U. S. 496, 83 Law. Ed. 1423.

4. *The Allegations of the Complaint Do State a Cause of Action Under the Laws and Constitution of the United States.* 8 U. S. Code Sec. 43, 28 U. S. Code Sec. 1343 (3), 28 U. S. Code Sec. 1331, Sec. 1 of the 14th Amendment of the U. S. Constitution, 54 Am. Jur. U. S. Courts Sec. 346, page 946, 13 A. L. R. 2nd 550, *Ghadiali v. Delaware State Medical Society* (1939), 28 Fed. Supp. 841. *Bell v. Hood*, supra; *Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U. S. 278.

While 28 U. S. Code, Sec. 1331 and 8 U. S. Code, Sec. 43 overlap, it would seem that more specific grounds for jurisdiction is found under the Civil Rights Act. The specific provision to which the writer refers (Sec. 1 of the Civil Rights Act of April 20, 1871, 17 Stat. 13, now R. S. 1879) reads:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

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This Statutory language confers a right to recover if four conditions are met: (1) plaintiff is a citizen of or a person within the jurisdiction of the United States, (2) defendants' conduct was under color of state law, (3) defendants' conduct caused plaintiff to be deprived of a right or privilege secured to him by the Constitution or laws of the United States, and (4) the plaintiff's proceeding is an appropriate one.

The Complaint satisfies all four of these requirements:

(1) Plaintiff a Citizen or a Person Within the Jurisdiction of the United States.

This is alleged in Paragraph "2" of the Complaint.

(2) Defendants' Conduct Under Color of State Law.

(a) The abuse and misuse of State conferred power, as set out in paragraphs five through seven and nine through twelve of the complaint herein constitutes action or conduct "under color of" state law within the meaning of 8 U. S. C. A. Sec. 43.

Mr. Justice Stone said in *United States v. Classic*, 313 U. S. 299, 326:

> "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with authority of state law is action taken 'under color of' state law."

In *Screws v. United States*, 323 U. S. 91, 111, Mr. Justice Douglas said:

> "It is clear that under 'color' of law means under 'pretense' of law. Thus acts of officers in the ambit of their personal pursuits are plainly excluded. Acts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it."

Here the state officer and employee defendants, the Complaint alleges, conspired to and did undertake to perform their official duties in such a way as to cause plaintiff to lose his employment.

See also *Picking v. Pennsylvania R. Co.*, supra; *Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U. S. 278 (1913); *Cattlette v. U. S.*, 132 Fed. 2nd 902; *Valle v. Stengel*, 176 Fed. 2nd 697; *Yick-Wo v. Hopkins* (1886) 118 U. S. 356; *Ex Parte Virginia* (1880) 100 U. S. 39.

(b) The defendants who were not state officers and employees are liable under 8 U. S. Code Sec. 43 if, as the Complaint alleges, they participated in a conspiracy to misuse State authority. *Picking v. Pa. R. Co.*, supra.

(3) Defendants' Conduct Cause of Plaintiff's Being Deprived of Amendment XIV Rights—(1) The Right to Work; (2) Property Rights in Job and Salary.

(a) Defendants' conduct deprived Plaintiff of his fundamental right to work. The right to work is a right secured to plaintiff by Amendment XIV against unjustified State action under color of State law.

This proposition is established by *Truax v. Raich*, 239 U. S. 33, 41, wherein Mr. Justice Hughes said:

> "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure."

See also *New State Ice Co. v. Liebman,* 285 U. S. 262 (1932); *Yick-Wo v. Hopkins,* supra; *Allgeyer v. Louisiana* (1897) 165 U. S. 578.

(b) Respondents' conduct deprived petitioner of fundamental property rights without due process of law.

The 14th Amendment protection of a man's "right to work" extends to a particular job if, in fact, he is deprived of his employment through wrongful state action. An individual has property rights in the particular job he holds, 73 C.J.S. Property § 2 page 151; the salary he is receiving, *Cobb v. City of Malden, et al* (1st Circuit 1953) 202 Fed. 2nd 701; *Hibbard v. State,* 65 Ohio State 574, 64 N. E. 109; *Hooker v. McLennan,* 236 Mass. 117, 127 N. E. 626; *Greene v. Knox,* 175 N. Y. 432, 67 N. E. 910; his seniority rights, *Walker v. Pennsylvania-Reading Seashore Lines,* 142 N.J. Eq. 588, 61 A.2nd, 453, 461; and his contract of employment, *Lynch v. U. S.,* 54 Sup. Ct. 840, 843; *Lucas v. Schneider* (CCA Ky.) 47 Fed. 2nd 1006, 1008.

(c) That the employment of which plaintiff was deprived was employment at will is immaterial.

In *Truax v. Raich,* 239 U. S. 33, 38, Mr. Justice Hughes said:

> "The fact that employment is at the will of the parties, respectively, does not make it one at the will of others. The employee has manifest interest in the freedom of the employer to exercise his judgment without illegal interference or compulsion . . ."

(4) A Tort Action for Conspiracy is a "Proper Proceeding for Redress" Within the Meaning of 8 U. S. Code § 43.

This proposition is established by *Picking v. Pennsylvania R. Company,* supra.

ARGUMENT

I.

Gravamen of Complaint

The petitioner, S. L. Kilgore, was for eighteen years Sales Manager for Florida Crushed Stone Company (hereinafter sometimes referred to as "the company"), a sales organization existing for the sole purpose of marketing crushed stone. The company's primary customers were road contractors doing business with the Florida State Road Department and the building of roads and bridges by the State of Florida furnished the major market for the company's products. Over the years Florida Crushed Stone has achieved close cooperation with the technical staff of the State Road Department in working out gradations of crushed stone and geared its operation and conformed its product to the Road Department's specifications. Florida Crushed Stone was the major source of supply in Florida for large quantities of the various types of stone specified by the State Road Department for state projects.

Respondents, hereinafter referred to as the Defendants, some of whom held high public offices and some of whom did not, entered into a conspiracy with the end in view of reimbursing them or some of them for large expenditures in the 1948 Florida gubernatorial campaign. The terms of

this conspiracy required those defendants holding state offices and positions to use their state conferred power and authority, if necessary, to accomplish the same. The money to repay said campaign contributions was to be obtained by forcing Florida Crushed Stone Company to pay a kickback upon materials sold to road contractors doing business with or for the state. Defendants made this proposal to the company, but the petitioner and the then president of the company refused to do business on the basis suggested.

The defendants, holding state offices, did then and there in their official capacity as officers of the State and by authority as such officers, promulgate certain changes in the specifications for gradations of crushed stone to be used in state projects, the practical effect of which was to eliminate Florida Crushed Stone from bidding on many state jobs. The said defendants, after taking the official action above described, demanded that Florida Crushed Stone:

A. Comply with their demand on the kickback; and

B. Discharge the Petitioner from his employment as Sales Manager. These demands were refused by Florida Crushed Stone Company until it became apparent to the President thereof that the continued refusal to comply with said demand would put the company out of business. As a direct and proximate result of the conspiracy and the above described official action by the defendants in their official positions as state officers and officials, Florida Crushed Stone capitulated to these demands and the petitioner, S. L. Kilgore, was summarily, unreasonably, and without any just cause, deprived of his employment with the company.

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That as part of said conspiracy the respondents (defendants) through the co-respondents and co-conspirators Doebler and Treadway, assured the officials of Florida Crushed Stone Company that the following had been accomplished by these defendants with regard to crushed stone and other rock materials in Florida. The State of Florida had been divided into three areas. The Northern area of Florida would be assigned to Alabama Slag, the Southern area of Florida would be assigned to the East Coast Stone Company, and the territory in between, comprising the bulk of Peninsular Florida, would be reserved for the products of the Florida Crushed Stone Company. This arrangement would eliminate competitive bids and would enable the Florida Crushed Stone Company to charge higher prices for its products. (It is perfectly clear that if the plaintiff, Kilgore, was objectionable as the Sales Manager of the Florida Crushed Stone Company because of his resistance to this alleged conspiracy, he would be objectionable as an employee in a like capacity in any of the other big stone companies doing business with the State of Florida. Kilgore would not only be deprived of his right to work as Sales Manager of Florida Crushed Stone Company, but also of like work for any other similar business desiring his services in the State of Florida.)

As a direct and proximate result of the above conspiracy by the said defendants and their official actions as officers and agents of the state, Petitioner, S. L. Kilgore, suffered severe nervous and physical injury which *permanently* disabled him from pursuing *any* gainful employment. Petitioner, unable to do any work, had been effectively deprived by State action of his right and liberty to work, and had been deprived of his property, i.e. his job, his seniority therein, and his Twelve Thousand ($12,000.00) Dollars per annum salary, without due process of law.

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II.

THE CLAIM COMPLIES SUBSTANTIALLY WITH RULE 8 OF THE FEDERAL RULES OF PROCEDURE, BEING SO DRAWN AS TO CLAIM RELIEF UNDER THE CONSTITUTION AND LAWS OF THE UNITED STATES.

The Circuit Court of Appeals held:

> "As the complaint wholly and unamendably fails to state a claim under 8 U.S.C.A. 47 (3), or any other Federal law, the complaint was properly dismissed."

Rule 8 (a) of the Federal Rules of Civil Procedure provides:

> "*Claims for relief.* A pleading which sets forth a claim for relief, whether an original claim, counterclaim, or third party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded."

Rule 8 (e) (1) of the Federal Rules of Civil Procedure provides as follows:

> "Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required."

"The Complaint was designed (1) to state a claim that defendants, by conspiratory action under color of state law, have caused plaintiff to be deprived of the right to

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work secured to him by Amendment XIV and that defendants have thus rendered themselves liable in damages to plaintiff under 8 U. S. Code § 43, (2) to point out that jurisdiction of such a claim is conferred upon this court by 28 U. S. Code § 1343 (3), and (3) to demand judgment for damages. It is submitted that the complaint complies substantially with Rule 8 of the Federal Rules of Civil Procedure and the District Court erred in not recognizing its jurisdiction.

If the pleader fails, through some technicality, to accomplish his design, then leave to amend which Rule 15 of the Federal Rules of Civil Procedure procedure provides: "shall be freely given when justice so requires", should have been granted. However, the opinions of the learned courts below set out clearly that the niceties of pleading are not relied upon in holding that no basis for federal jurisdiction existed herein. Petitioner is in full accord with the thought that the complaint herein stands or falls as is. It is either so drawn as to claim relief under the Constitution and Laws of the United States or it wholly and unamendably fails to do so.

However, it is submitted that the courts below did not properly consider two salutary principles:

A. Constitutional questions should not be disposed of upon a Motion to Dismiss or an equivalent motion, and

B. A complaint is sufficient where it is so drawn as to claim a right or remedy under the Constitution or Laws of the United States.

This Honorable Court has always held that on grave

Constitutional questions the plaintiff is entitled to his day in court. *Borden's Farm Products Co. v. Baldwin,* 293 U. S. 194, 55 Sup. Ct. 187, 79 L. Ed. 281. *Polk Company v. Glover,* 305 U. S. 5, 59 S. Ct. 15, 83 L. Ed. 6.

Thus Mr. Justice Stone and Mr. Justice Cardozo in *Borden's Farm Products Co. v. Baldwin,* supra, in a concurring opinion stated:

> "We are in accord with the view that it is inexpedient to determine grave Constitutional questions upon a demurrer to a Complaint, or upon an equivalent motion, if there is a reasonable likelihood that the production of evidence will make the answer to the questions clearer."

In *Polk Company v. Glover,* supra, the court said:

> "We think that the facts alleged in the bill were sufficient to entitle the plaintiffs to an opportunity to prove their case, if they could, and that the Court should not have undertaken to dispose of the Constitutional issues (as to which we intimate no opinion) in advance of that opportunity . . . the salutary principle that the essential facts should be determined before passing upon grave Constitutional questions is applicable . . . "

The Borden's and Polk cases, above, have been followed by the later decisions of the Federal Courts. Thus in *Picking v. Pennsylvania R. Co.,* supra, where the complaint contained one hundred fifty-four paragraphs and was difficult to follow and understand, the learned District Judge holding that the suit should be dismissed because the complaint failed to comply with the requirements of Rule 8 (e) (1) of the Rules of Civil Procedure, was reversed, on the authority of the Borden's Case and the Polk Case above.

Federal Jurisdiction will exist in all cases in which there is a Federal question before the court. When does a case present a Federal question?

> "A case presents a Federal question where, in order to reach a correct decision of the material issues, it becomes necessary to construe the Federal Constitution . . . or to decide the existence of a right, title, privilege, claim, or immunity asserted thereunder." 54 *Am. Jur.* U. S. Courts, Sec. 45, page 700.

Thus this court in *Bell v. Hood,* supra, in holding a complaint sufficient because it was drawn so as to claim a right to recover under the Constitution and Laws of the United States, said:

> "Whether or not the complaint as drafted states a common law action in trespass made actionable by state law, it is clear from the way it was drawn that petitioners seek recovery squarely on the ground that respondent violated the Fourth and Fifth Amendments . . . where the complaint, as here, is so drawn as to seek recovery directly under the Constitution or Laws of the United States, the Federal Court . . . must entertain the suit[1] . . . The reason for this is that the court must assume jurisdiction to decide whether the allegations state a cause of action in which the court can grant relief as well as to determine issues of fact arising in the controversy.
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> "Whether the petitioners are entitled to recover depends upon an interpretation of 28 U.S.C.A. § 41 (1), 7 F.C.A. Title 28, § 41 (1) and on a determination of the scope of the Fourth and Fifth Amendments' pro-

1. This court stated that the rule of *Bell v. Hood,* supra, did not apply to two situations: (1) where it clearly appears from the complaint that the Federal claim is frivolous, or (2) where the Federal claim clearly appears to be immaterial and made solely for the purpose of getting into the Federal courts.

tection from unreasonable searches and deprivations of liberty without due process of law. Thus, the right of the petitioners to recover under their complaint will be sustained if the Constitution and Laws of the United States are given one construction and will be defeated if they are given another. For this reason the District Court has jurisdiction. (Cit. auth.)"

Applying the rule of *Bell v. Hood,* supra, to the case herein, and substituting the Fourteenth Amendment and 28 U. S. Code Ann. § 1343 (3) and 8 U.S.C.A. § 43, the above quote would read as follows:

"Whether the petitioners are entitled to recover depends upon an interpretation of 28 U. S. CODE ANN. Sec. 1343 (3), 8 U. S. CODE ANN. § 43, and on a determination of the scope of the FOURTEENTH AMENDMENT'S protection . . . thus, the right of the petitioners to recover under their complaint will be sustained if the Constitution and Laws of the United States are given one construction and will be defeated if they are given another. For this reason the District Court has jurisdiction."

III.

JURISDICTION UNDER 28 U. S. CODE SEC. 1343 (3) CLEARLY EXISTS IF THE COMPLAINT STATES A CAUSE OF ACTION UNDER 8 U. S. CODE SEC. 43.

Twenty-eight U. S. Code, Sec. 1343 provides:

"*Civil Rights.* The District Court shall have original jurisdiction of any Civil Action authorized by law to be commenced by any person;

"(3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, or any rights, privilege or immunity secured

by the Constitution of the United States or by any act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of United States."

In the words of the Court in *Picking v. Pennsylvania R. Co.*, supra:

> "It follows that if the plaintiff in the case at bar were deprived of a Federal right by state officials or officers acting 'under color of any law'—or as may be stated more aptly in the instant case 'under color of any statute . . . of any state' these officials must respond in damages to the plaintiff as prescribed by R. S. Sec. 1949 (Note 8. U. S. Code Sec. 43)."

See also *Hague v. C. I. O.*, 59 S. Ct. 954, 307 U. S. 496, 83 L. Ed. 1423.

IV.

THE ALLEGATIONS OF THE COMPLAINT DO STATE A CAUSE OF ACTION UNDER THE LAWS AND CONSTITUTION OF THE UNITED STATES.

The District Court held herein that:

> "No Federal jurisdiction exists by virtue of either of the Federal Statutes cited in the complaint, or by virtue of the Constitution of the United States, or upon any other grounds. Plaintiff has cited Title 8, U.S.C.A., Sec. 41 and 43, and Title 28, U.S.C.A., Sec. 1331 in support of his position. The Court specifically finds that none of these sections confers jurisdiction upon this Court in the causes made out in plaintiff's complaint."

The Fifth Circuit Court held:

> " . . . The complaint wholly and unamendably fails to

state a claim under 8 U.S.C.A. 47 (3), or any other Federal law . . . "

This suit is brought under Section 1 of the Fourteenth Amendment to the United States Constitution and the following statutes: U. S. Code Title 8, Sec. 43;[2] U. S. S. Title 28, Sec. 1343; and U. S. C. Title 28, Sec. 1331.

It goes without saying that the mere fact that a state statute or the common law is involved will not debar the Federal Court of jurisdiction. *Bell v. Hood,* supra.[3] Nor

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2. *Ghadiali v. Delaware State Medical Soc.* (1939) 28 F. Supp. 841, contains a discussion of 8 U.S.C.A. Sec. 43 as to its history:

> "Section 1 of the Civil Rights Act of April 20, 1871, 17 Stat. 13 (8 USCA Sec. 43 note), provided that 'Any person who, under color of any law, statute, ordinance . . . of any State, shall subject or cause to be subjected any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall . . . be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress'. And it directed that such proceedings should be prosecuted in the several district or circuit courts of the United States. The right of action given by this section was later specifically limited to 'any citizen of the United States or other person within the jurisdiction thereof', and was extended to include rights, privileges and immunities secured by the laws of the United States as well as by the Constitution. As thus modified the provision was continued as Sec. 1949 of the Revised Statutes and now constitutes Sec. 43 of Title 8 of the United States Code, 8 USCA Sec. 43. *It will be observed that the cause of action given by the section in its original as well as its final form, extends broadly to deprivation by state action of the rights, privileges and immunities secured to persons by the Constitution. It thus includse the Fourteenth Amendment and such privileges and immunities as are secured by the due process and equal protection clauses, as well as by the privileges and immunities clause of that amendment.*" (Emphasis supplied.)

3. "Whether or not the complaint as drafted states a common law action in trespass made actionable by state law, it is clear from the way it is drawn that petitioners seek recovery squarely on the ground that respondents violated the Fourth and Fifth Amendments . . . "

should a Federal court dismiss an action for lack of jurisdiction where the violation of the State Constitution is also involved. *Home Tel. & Tel. Company v. City of Los Angeles,* 227 U. S. 278 (1913).[4]

Eight U.S.C.A., § 43 and 28 U.S.C.A., § 1331 are parallel provisions, one conferring jurisdiction to entertain suits arising under the Constitution or Laws of the United States in which the amount in controversy exceeds Three Thousand ($3,000.00) Dollars, and the other conferring jurisdiction authorized to be brought by the Civil Rights Act regardless of the amount in controversy. The matter is discussed in detail in a recent annotation at 13 A.L.R. 2nd 550.

> "Where proper allegations showing a denial, through laws, ordinances, or governmental agencies or activities, of civil liberties and rights secured by the fundamental freedoms clauses of the Constitution are presented, there is little doubt of the jurisdiction of the lower Federal Courts to afford redress. The problem is not primarily one of the existence of Federal jurisdiction, but whether it is sought, and properly sought, (1) under the 'general' jurisdiction statute—28 USC 1948 Revision Sec. 1331, formerly Judicial Code Sec. 24 (1), 28 USCA Sec. 41 (1), FCA Title 28, Sec. 41 (1)—as involving an action arising under the Consti-

4. In this case, the plaintiff telephone company sued the city to prevent it from putting into effect an ordinance setting telephone rates, claiming that the rates were so low as to amount to confiscation without due process of law. The lower court dismissed the bill for lack of jurisdiction on the grounds that the state had a due process clause, and the plaintiff never invoked state aid. The United States Supreme Court reversed, holding that one whose rights, which are protected by a provision of the Federal Constitution and are identical with a provision of the State Constitution, are invaded by State officers claiming to act under a statute, is not debarred from seeking relief in the Federal Court under the Federal Constitution until after the state court has declared that the acts were authorized by statute. It is felt that further citation of authority o support this point is unnecessary.

tution of the United States and requiring statement of the requisite jurisdictional amount, or (2) under the 'specific' statute vesting Federal jurisdiction of actions to redress deprivation of 'civil rights'—28 USC 1948 Revision Sec. 1343, formerly Judicial Code Sec. 24 (14), 28 USCA Sec. 41 (14) FCA Title 28, Sec. 41 (14)—requiring no statement as to jurisdictional amount. There are decisions of the Federal Supreme Court which point out a line of demarcation between the two jurisdictional statutes; but it is not easy, in all instances, from the various court opinions, to determine whether jurisdiction was rested on one of the statutes or the other or on both, since occasionally the courts have either specifically upheld Federal jurisdiction without stating which of the two statutes was its basis, or have upheld jurisdiction without particular discussion or comment and without stating on which statute it rested.

" 'In the leading case of Hague v Committee for Industrial Organization (1939) 307 US 496, 83 L. Ed. 1423, 59 S. Ct. 954, in the opinion of Mr. Justice Stone, it was pointed out that since 1875, acts conferring jurisdiction on the Federal trial court have contained two parallel provisions, one conferring jurisdiction to entertain suits arising under the Constitution or laws of the United States in which the amount in controversy exceeded a specified value, and the other, now being 28 USC 1948 Revision Sec. 1343, formerly Sec. 24 (14) of the Judicial Code, conferring jurisdiction on such courts of suits which were authorized to be brought by the Federal Civil Rights Act of 1871 regardless of the amount in controversy. He further pointed out that although the actions might come under former Sec. 24 (14) conferring jurisdiction notwithstanding that a value in excess of a certain amount was not specified, it also should be noted that all of the suits arising under the statute of the United States to redress deprivation of rights, privileges, and immunities secured by the Constitution, and thus literally

all would be suits 'arising under the Constitution of laws of the United States.' "

In 54 Am. Jur. U. S. Court Section 316, page 947, it is said:

> "District courts are also given jurisdiction of suits concerning civil rights such as those for the recovery of damages because of injury to person or property or deprivation of right or privilege of a citizen of the United States by any act done in the furtherance of any conspiracy to injure, oppress, threaten, or intimidate citizens in the free exercise or the enjoyment of Civil rights secured to them by Federal law, or to redress the deprivation of rights, privileges, or immunities secured by the Federal Constitution."

In any event, no argument is required for the proposition that Federal jurisdiction will exist in all cases in which there is a Federal question before the court and a Federal question is involved in a case where it becomes necessary to construe the Federal constitution or decide the existence of a right, privilege, claim or immunity asserted thereunder. 54 Am. Jur. U. S. Court Sec. 45 page 700.

While 28 U.S.C. Sec. 1331 and 8 U.S.C.A. Sec. 43 overlap, the more specific grounds for jurisdiction is found under the Civil Rights Act. The statutory language of 8 U. S. C. A. Sec. 43 confers the right to recover if four conditions are met:

A. Plaintiff is a citizen of or a person within the jurisdiction of the United States.

B. Defendants' conduct was under color of State law.

C. Defendants' Conduct caused plaintiff to be deprived of a right or privilege secured to him by the Constitution or Laws of the United States, and

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D. The plaintiff's proceeding is an appropriate one.

The complaint satisfies all four of these requirements.

A. *Plaintiff a Citizen or Person Within the Jurisdiction of the United States.* This is alleged in paragraph two of the Complaint:

> "2. Plaintiff, who is now and was at all times mentioned in this suit, a citizen of the United States . . . "

B. *Defendants' Conduct under Color of State Law.* Judge Strum, in the Circuit Court opinion, stated:

> "The Fourteenth Amendment does not have the effect of taking into Federal control the protection of private rights against invasion of individuals."

The learned Judge Strum's statement, above quoted, ignores those paragraphs of the complaint (5 through 7 and 9 through 12) alleging that the defendants who were state officers or employees utilized the power and authority they possessed as such pursuant to a conspiracy to subject petitioner to the loss of his Federally protected rights. We have no quarrel with the said proposition of law as stated by Judge Strum, but we question its application herein. What the learned Judge ignores is that the "individuals" were the Governor and the State Road Board of Florida, *acting in their official capacities!*

Paragraph five of the Complaint sets up that Fuller Warren, then Governor of Florida, directed the Chairman of the State Road Department, Alfred McKethan, to so operate his department as to force Florida Crushed Stone Company to pay kickbacks. Paragraph six alleges that the defendants entered into the conspiracy to force illegal payments from Florida Crushed Stone and to force the

discharge of the petitioner. Paragraph seven sets out how the Chairman of the State Road Department and the members thereof used their State conferred power to so change specifications for crushed rock as to effectively shut out Florida Crushed Stone Company and thus "soften up" the company. Paragraphs nine and ten of the Complaint outline how the kickback arrangement was worked out. (The spectacle of the Florida Crushed Stone Company, a *sales* organization employing a "broker" to sell to its old customers makes things quite obvious.) Paragraph eleven and twelve of the complaint set out the petitioner's hostility toward the "shakedown" arrangement, and his subsequent dismissal.

1. *The abuse and misuse of State conferred power, as set out in paragraphs five through seven and nine through twelve of the complaint herein, constitute action or conduct "under color of" state law within the meaning of 8 U.S.C.A. Sec. 43.*

The question is whether or not the actions of the Governor and the Chairman and members of the State Road Department as set out in the Bill of Complaint are such as to constitute action under "color of law". The law is, simply stated, that where individuals misuse power they possess by virtue of State law and made possible because the wrongdoers are clothed with the authority of State law, then such action is "state action". *Home Tel. & Tel. Co. v. City of Los Angeles,* supra. *United States v. Classic,* 313 U. S. 299 (1941), *Screws v. U. S.,* 325 U. S. 91 (1945), *Yick-Wo v. Hopkins* (1886) 118 U.S. 356; *Ex parte Virginia* (1880) 100 U.S. 39, *Catlette v. U. S.,* 132 Fed. 2nd 902, *Valle v. Stengel,* 176 Fed. 2nd 697, *Picking v. Pennsylvania R. Co.* (3rd Circuit) (1945) 151 Fed. 2nd 240. In the instant case many of the defendants were State officials. The con-

spiracy was carried on because of the defendants' cloak of authority under the state law; indeed, their plan could not have been accomplished unless they had such official power. The change in the specifications of crushed stone was accomplished by some of the named defendants sitting in a duly constituted state board, and all this action was done at the instance and instigation of the then Governor of the State, who is a defendant.

This court in *Home Tel. and Tel. Co. v. Los Angeles*, supra, said:

> "The Amendment contemplates the possibility of state officers abusing the powers lawfully conferred upon them by doing wrongs prohibited by the Amendment. In other words the Amendment, looking to the enforcement of the rights which it guarantees and to the prevention of the wrongs which it prohibited, proceeds not merely upon the assumption that states acting in their governmental capacity in a complete sense may do acts which conflict with its provisions, but, also conceiving which was more normally to be contemplated, that state powers might be abused by those who possessed them as a result might be used as the instrument for doing wrongs, provided against all and every such possible contingency."

The leading case on the subject is *United States vs. Classic*, 313 U. S. 299 (1941), where the Court said:

> "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with authority of state law, is action taken 'under color of' state law."

In that case, state election officials were charged with failure to count the votes as cast, alteration of the ballots, and false certification of the number of votes cast for the

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respective candidates. The court stated that those acts of the defendants "were committed in the course of their performance of duties under the Louisiana statute requiring them to count the ballots, to record the result of the count and to certify the result of the election." As stated above, the action of the defendants in their capacity as the state board in carrying out their conspiracy was enabled to be accomplished only because of their duly constituted authority.

The Classic Case was followed in *Screws v. United States,* supra, wherein the above quoted language was approved. This case involved a conviction of a sheriff and his assistants on a criminal code making it an offense wilfully to deprive one, under color of law, of rights, privileges or immunities secured to him by the constitution and the laws of the United States and of conspiring to violate such statute. In the Screws case, Mr. Justice Douglas, speaking for the Court said:

> "It is clear that under 'color' of law means under 'pretense' of law. Thus acts of officers in the ambit of their personal pursuits are plaintly excluded. Acts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it."

Catlette vs. U. S., 132 Fed. 2d 902. This was a criminal action against one Catlette, a Deputy Sheriff in West Virginia, for alleged violations of the U. S. Code. Members of Jehovah's Witnesses were detained in Catlette's office and the Deputy Sheriff removed his badge and stated in substance that his acts thereafter would not be done in the name of the law, whereupon he compelled the individuals to submit to indignities. The Court held that, in so doing, he was acting under "color of law."

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> "Catlette's argument is, therefore, reduced to nothing more than the notion that an officer can divorce himself from his official capacity merely by removing his badge of office before embarking on a course of illegal conduct, and thereby blithely absolve himself from any liability for his ensuing nefarious acts. We must condemn this insidious suggestion that an officer may thus lightly shuffle off his official role. To accept such a legalistic dualism would gut the Constitutional safeguards and render law enforcement a shameful mockery."

Valle vs. Stengel, 176 Fed. 2d 697. In this case the Court held that an allegation that a Chief of Police aided and abetted park management in the complained of act—barring Negroes from a swimming pool—was an allegation that the acts were done under color of law, although the Chief acted in violation of a State Statute.

> "The fact that Stengel, a law enforcement officer, was acting in defiance of the law of New Jersey . . . will not serve as a defense . . . "

So the injunction of the Fourteenth Amendment that no State shall deny to any person within its jurisdiction the equal protection of the laws was held to be infringed by a state judge who so directed the selection of jurors as to make impossible the drawing of any Negro as a juror although the State Statutes did not authorize such discrimination. *Ex Parte Virginia* (1880) 100 U. S. 39.

Yick-Wo vs. Hopkins (1886) 118 U. S. 356. The city and county of San Francisco enacted an ordinance as follows:

> "It shall be unlawful, from and after the passage of this order, for any person or persons to establish, maintain, or carry on a laundry within the corporate limits of the city and county of San Francisco without

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having first obtained the consent of the Board of Supervisors, except the same be located in a building constructed either of brick or stone."

Violation of the ordinance was made a misdemeanor punished by fine or imprisonment. Yick-Wo was convicted thereunder and committed for non-payment of a fine imposed. He applied to the Supreme Court of California for a writ of habeas corpus, contending that he was being held in violation of the Fourteenth Amendment. The following allegations of fact were admitted: That Yick-Wo was an alien of Chinese descent; that he had conducted a laundry in the same building for twenty-two years; that he had applied for and had been refused a renewal of his license; that his building had been inspected by the fire warden and approved; that of the 320 laundries in the city, 240 were owned by Chinese aliens and that 310 were constructed of wood, as was Yick-Wo's; that 200 Chinese who had applied for laundry licenses had been denied them, while all applications for laundry licenses by persons who were not Chinese had been granted, with a single exception. The Supreme Court of California denied the petition and this writ of error was taken. The Supreme Court of the United States granted the petition, holding that the imprisonment of Yick-Wo was illegal. The ordinance was fair on its face, but the administration of the ordinance was such as to prevent all Chinese getting permits to operate their laundries. Though fair on its face *it was discriminatorily administered and therefore a denial of equal protection. Here, bad administration of a good ordinance was held to be state action.*

The parallel between the unfair administration of the San Francisco ordinance, which ordinance appeared perfectly good on its face, and the change of specifications as alleged in the Kilgore complaint, herein, is obvious.

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Picking v. Pennsylvania R. Co., supra, is a very interesting case. The record was somewhat confused, but this much seems clear: Mr. and Mrs. Picking were arrested in New York and charged with a misdemeanor, Thomas E. Dewey, then District Attorney, filed an information charging plaintiffs, (Mr. & Mrs. Picking), with the commission of the misdemeanor. Later, apparently before trial, the Pickings went to Pennsylvania. Formal extradition proceedings were then commenced, and Governor Lehman, Governor of New York, formally requested extradition of Governor James, Governor of Pennsylvania. Governor James, after receiving assurance from the Pennsylvania Department of Justice that everything was legal and proper, issued a warrant for the arrest of Mrs. Picking. In due time the Pickings were arrested and sent back to New York. Shortly thereafter the Pickings brought an action for damages alleging a conspiracy to deprive them of their rights under the Fourteenth Amendment as implemented by 8 U. S. C. A., § 43. The complaint comprised 154 paragraphs which were in the words of the court, complex, prolix, and contradictory. The Complaint named the Governor of Pennsylvania, the arresting officers, a Pennsylvania J. P. who refused a hearing to plaintiffs on their arrest in Pennsylvania, the Pennsylvania Railroad Company (which transported the Pickings back to New York after their arrest), Thomas E. Dewey, and many others as defendants. The Lower Court granted the various Motions to Dismiss filed by the defendants, but was reversed by the Court of Appeals on the strength of *U. S. v. Classic*, supra and *Screws v. U. S.*, supra. The Circuit Court quoted at length from both the Classic and Screws Cases, concluding that although the Picking case was an action for damages under R. S. Sec. 1949, (8 U.S.C.A. Sec. 43) the definitions of "color of law" employed in the Screws and Classic Cases would apply.

"The operative language of R. S. Sec. 1979, insofar as is material to the issues presented by this phase of the instant case, is identical with that of Sec. 20 of the Criminal Code. It follows that R. S. Sec. 1979 must be construed as in pari materia with Sec. 20. The phrase 'under color of any statute . . .' employed in R. S. Sec. 1979 must be construed as was the phrase 'under color of any law' in the Screws case."

". . . It follows that if the plaintiffs in the case at bar were deprived of a Federal right by state officials or officers acting 'under color of any law' or as may be stated more aptly in the instant case 'under color of any statute . . . of any state' these officials must respond in damages to the plaintiff as prescribed by R. S. Sec. 1979. . ."

In the principal case, the Kilgore complaint alleges that the State officers and employees who are defendants conspired to and did undertake to perform their official duties in such a way as to cause petitioner to lose his employment. Clearly, under the law as established by this Honorable Court, the alleged conduct of defendants herein who are state officers or employees constitutes conduct "under color of" State law within the meaning of 8 U. S. C. A. Sec. 43.

2. *The defendants who were not state officers and employees are liable under 8 U. S. Code, Sec. 43 if, as the Complaint alleges, they participated in a conspiracy to misuse State authority.*

This proposition is established by Picking vs. Pennsylvania R. Co., supra. As was pointed out above, one of the defendants named by the plaintifs, Mr. and Mrs. Picking, was the Pennsylvania Railroad Company who transported

them back to New York in accordance with the arrest and extradition. The railroad brought a motion to dismiss on the theory that it was not the agent of any State and since it was only performing its duties as a common carrier, should not be named a defendant. The Court said:

> "The corporate defendant, the Pennsylvania Railr .d Company, however, is not an agency of any State. It is a privately owned railroad corporation. It has moved to dismiss the complaint upon the ground inter alia that 'there is nothing in the allegations of the complaint that the Pennsylvania Railroad Company did other than transport as a common carrier the complainants while in the custody of officers of the law.' But if, as the plaintiffs assert, this defendant 'materially and physically participated in' all the alleged unlawful acts of September 15, 1941, it may have joined in, or as the plaintiffs put it, 'adopted' the conspiracy as its own. The complaint does not explain how the corporate defendant intra vires could have done so. . . (but) we may not conclude that the plaintiffs have not stated a valid cause of action under the Civil Rights Act against it (Railroad)."

Paragraph ten of the plaintiff's complaint sets out how Construction Equipment Company took part in the conspiracy. Paragraph twelve of the complaint sets out that "each of the defendants herein acting in concert and pursuant to the aforesaid continuing conspiracy. . . have conspired to deprive plaintiff of his right to engage in the gainful employment which he held . . . in direct contravention of the provisions of the Constitution and Statutes of the United States of America."

The defendants who were not state officers and employees are liable under 8 U.S.C.A. Sec 43 as they participated in the conspiracy to misuse State authority.

C. *Defendants' Conduct Cause of Plaintiff's being Deprived of Amendment Fourteen Rights: 1. The Right to Work. 2. Property Rights in Petitioner's Employment.*

On page three of the Circuit Court's opinion affirming the Lower Court's decision in this cause, the Court, speaking through Honorable Justice Strum made the following statements:

> "Plaintiff's complaint is that, as a result of an alleged conspiracy to raise funds for political purposes he was wrongfully discharged because he would not assent to the plan. The acts of which plaintiff complains would, at most, amount to an ordinary tort remediable under State law. *It is not alleged that the plaintiff was deprived of his right to work, but only that he was discharged from the particular job.* (Emphasis supplied.)

It is submitted that Mr. Justice Strum overlooked and wholly failed to consider the great property right which petitioner had in his "particular job". Petitioner had worked for Florida Crushed Stone Company nineteen years, of which eighteen were spent as Sales Manager of that company, and it is reasonable to assume that this was probably his only means of livelihood for which he was adequately trained. It is submitted that the Fourteenth Amendment's protection of a man's "right to work" extends to a particular job if, in fact, the individual is deprived of his employment through wrongful state action. An individual has property rights in the particular job he holds, 73 C.J.S. Property Sec. 2, page 151; the salary he is receiving, *Cobb v. City of Malden, et al* (1st Circuit 1953) 202 Fed. 2nd 701; *Hibbard v. State,* 65 Ohio State 574, 64 N. E. 109; *Hooker v. McLennan,* 236 Mass. 117, 127 N. E. 626; *Greene v. Knox,* 175 N. Y. 432, 67 N. E. 910; his seniority rights, *Walker v. Pennsylvania-Reading Seashore*

Lines, 142 N. J. Eq. 588. 61 A. 2nd, 453, 461; and his contract of employment, *Lynch v. U. S.,* 54 Sup. Ct., 840, 843, 293 U. S. 571, 78 L. Ed. 1434; *Lucas v. Schneider* (CCA Ky.) 47 Fed. 2nd 1006, 1008; even though his contract was at will, *Truax v. Raich,* 239 U. S. 33 (1915). It must be remembered that the right to work is the foundation of all property rights.

1. *Respondents' conduct deprived petitioner of his fundamental right to work.*

We would respectfully point out to this Honorable Court that the complaint herein, does far more than merely allege the simple loss of a particular job. The petitioner's complaint alleges that the respondents by their conspiratorial actions against him completely and permanently injured him "and by reason of which the said plaintiff (petitioner) has become incapacitated from attending to any gainful occupation and has lost his earning power, and will be so incapacitated for the remainder of his life, and has lost his usual earning powers for the remainder of his life. . ."

It is submitted that the foregoing is an allegation that petitioner has been deprived of his right to work and not just deprived of his employment in one particular job.

It should also be pointed out that the complaint directly alleges that the respondents (defendants) through the co-respondents and co-conspirators Doebler and Treadway, assured the officials of the Florida Crushed Stone Company that the following had been accomplished by these defendants with regard to crushed stone and other rock materials in Florida. The State of Florida had been divided into three areas. The Northern area of Florida would be assigned to Alabama Slag. The Southern area of Florida

would be assigned to the East Coast Stone Company. The territory in between, comprising the bulk of Peninsular Florida, would be reserved for the products of the Florida Crushed Stone Company. This arrangement would eliminate competitive bids and would enable the Florida Crushed Stone Company to charge higher prices for its products.

It is perfectly clear that if the plaintiff, Kilgore, was objectionable as the Sales Manager of the Florida Crushed Stone Company because of his resistence to this alleged conspiracy, he would be objectionable as an employee in a like capacity in any of the other big stone companies doing business with the State of Florida. The conclusion from the allegations set out in this complaint is inescapable that the complaint shows, if it is believed, that S. L. Kilgore was deprived of his right to work as Sales Manager of the Florida Crushed Stone Company or in a similar capacity for any other similar business desiring or needing his services in the State of Florida as a result of this alleged conspiracy.

The "right to work" is the very essence of the Fourteenth Amendment. If the Constitution of the United States does not shield an honest man from arbitrary or illegal "state action" against his employment, then we might as well call it slavery and be done with it. This Honorable Court in *Truax v. Raich,* supra, said:

> "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the amendment to secure."

The Truax Case is somewhat analagous to the case at hand. It involved an act of the State of Arizona requir-

ing every employer of more than five workers to employ not less than eighty per cent who were qualified electors or native born citizens of the United States. The plaintiff who was a native of Austria was faced with the loss of his job, and thereupon brought an action to declare the act unconstitutional. The United States Supreme Court held that the act was repugnant to the Fourteenth Amendment. In the case now before the Court, the petitioner, plaintiff below, was forced to lose his job through the action of the State Road Department in the passage of a regulation and certainly it would seem that such was a violation of the Fourteenth Amendment.

In *New State Ice Company v. Liebman,* 285 U. S. 262 (1932) the Court said:

> "A regulation which has the effect of denying or unreasonably curtailing the common right to engage in a lawful private business . . . cannot be upheld consistent with the 14th Amendment. Under that Amendment, nothing is more clearly stated than that it is beyond the power of a state . . . arbitrarily (to) interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.
>
> "The opportunity to apply one's labor and skill in an ordinary occupation with the proper regard for all reasonable regulations is no less entitled to protection."

In the case of *Allgeyer v. Louisiana* (1897) 165 U.S. 579, the Supreme Court spoke out eloquently in defense of a man's right to work:

> "The liberty mentioned in that (14th) amendment means not only the right to the citizen to be free from the mere physical restraint of his person, as by in-

> carceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.
>
> "It was said by Mr. Justice Bradley in Butchers Union Co. v. Crescent City Co., 111 U. S. 746, 762, in the course of his concurring opinion in that case, that 'the right to follow any of the common occupations of life is an inalienable right . . . the right to follow any of the ordinary callings of life is . . . one of the privileges of a citizen of the United States!' "

In *Yick-Wo v. Hopkins,* supra, there was involved the arbitrary application of an ordinance which would result in depriving plaintiff of his employment, and the court said:

> "The very idea that one man may be compelled to hold his life, or the means of living, or *any material right* essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

In view of the above, how it can be doubted that there is a Federal question involved in the facts as set out in the complaint is not known to the writers of this brief. There is, certainly, good ground for Federal jurisdiction.

2. *Respondents' conduct deprived petitioner of fundamental property rights without due process of law.*

It is submitted that the courts below overlooked and

neglected to consider the property interest that Petitioner, S. L. Kilgore, had in his employment, salary (Twelve Thousand dollars per annum) and seniority (nineteen years).

That a man's employment in a particular job and the material rights and tangible benefits derived therefrom are "property rights" within the benevolent protection of the Fourteenth Amendment seems clear. A man has an inalienable right to contract for employment (subject to the State's reasonable regulation) free from arbitrary "state action".

50 *C. J.*, page 738:

> "In modern legal systems, property includes practically all valuable rights. The term is indicative and descriptive of every possible interest which a person can have, extends to every species of valuable right or interest, and comprises a vast variety of rights . . . The right of a person to practice the profession for which he has prepared himself is property, as is the right to pursue a lawful business, the right to carry on an occupation, the right to labor, the right to enter into contracts of employment and the right to terminate such contracts."

73 *C. J. S. Property* § 2 (page 151):

> "Valid contracts are property, whether the obligor be a private individual, a municipality, a state or the United States, and the right to make contracts, either for the acquisition of property or with reference to the use of property, is an attribute of property and a property right.
>
> "There are numerous authorities which hold that a man's labor or right to labor is property, and the right to enter into contracts of employment or to terminate such contracts is regarded as property; and

the property which each one has in his own labor is the common heritage, and is the highest form of property, and includes what is produced by way of wages and salary, that is, anything acquired as a gain or profit from labor. The employment, trade, or calling of a person is a property right, and it is generally recognized that the right to carry on an occupation or to engage in a lawful business is a property right . . ."

The cases speak eloquently in recognition of a man's property right in his job and salary.

"The property of the capitalist is his gold and silver, his bonds, credit, etc., for in these he deals and makes his living. For the same reason, the property of the merchant is his goods. And every man's trade or profession is his property, because it is his means of livelihood; because, through its agency, he maintains himself and family, and is enabled to add his share towards the expenses of maintaining the government. Can it be said, with any degree of sense or justice, that the property which a man has in his labor, which is the foundation of all property and which is the only capital of so large a majority of the citizens of our country, is not property; or at least, not that character of property which can demand the boon of protection from the government? We think not." *Jones v. Leslie,* 61 Wash. 107, 110, 112 P. 81.

"The property which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hands; and to hinder him from employing these in what manner he may think proper, without injury to his neighbor, is a plain violation of this most sacred property." *Mowrey v. Mowrey,* 328 Ill. App. 92, 65 N. E. 2nd 234.

The incidents of a job are also "property rights" within the meaning of the Fourteenth Amendment. Thus a man's *contract* of employment is a property right. *Lynch v. U. S.*, 54 S. Ct. 840, 843, 292 U. S. 571, 78 L. Ed. 1434. *Lucas v. Schneider* (CCA Ky.) 47 F. 2nd 1006, 1008. His salary is a property right and entitled to protection under the Constitution and Federal Civil Rights Act. *Cobb v. City of Malden*, 202 F. 2nd 701 (1st Circuit 1953); *Hibbard v. State*, 65 Ohio St. 574, 64 N. E. 109; *Hooker v. McLennan*, 236 Mass. 117, 127 N. E. 626; *Greene v. Knox*, 175 N. Y. 432, 67 N. E. 910. Seniority rights of an employee (it is alleged that Kilgore was employed for nineteen years by Florida Crushed Stone Company) are property rights. *Walker v. Pennsylvania-Reading Seashore Lines*, 142 N. J. Eq. 588, 61 A. 2nd 453, 461.

The most recent case the writers of this brief have been able to find on point is *Cobb v. City of Malden, et al.* (U.S.C.A. 1st Cir. 1953) 202 F. 2nd 701. This was an action by school teachers against the City of Malden, Massachusetts and its officials alleging deprivation of salaries to which they were entitled, and conspiracy acting under color of law to impair their contracts for teaching, the Circuit Court held that the complaint stated a cause of action against the Mayor, and members of the Board of Aldermen, and common council individually within Federal jurisdiction for a wrong under the Federal Civil Rights Act:

> "It is alleged that these defendants, in furtherance of a conspiracy, deprived plaintiffs of their civil rights by employing state law to abrogate plaintiff's contract obligations. This is a Federal wrong and presents a case within Federal jurisdiction under 28 U.S. C. § 1343.

"Thus, if in this case, the salary schedules of 1947 provided for annual increases, it would seem that those increases were valid and subsisting obligations which could not constitutionally be impaired by State law. This is the substance of the allegations in the complaint, and the plaintiffs were entitled to a hearing on the merits of such allegations in order to determine whether or not there exists a cause of action against the defendants for subjecting plaintiffs to deprivation of rights secured to them by the constitution.

"The Federal policy of refraining from any unnecessary decision on a question of Constitutional law (cit. auth.) is inapplicable to this action for a wrong created by Federal law . . .

"Therefore, we are of the opinion that plaintiffs did state a cause of action within the jurisdiction of the Federal Courts as to the mayor, alderman, and councilmen of the City Malden."

3. *That the employment of which plaintiff was deprived was employment at will is immaterial.*

It is argued by the defendant in the Truax Case, supra, that the plaintiff had no cause of action since the employment was merely at will and the plaintiff could be fired by his employer for any reason or for no reason. In rebutting this argument, the Supreme Court of the United States said:

"It is said that the bill does not show an employment for a term, and that under an employment at will, the complainant could be discharged at any time, for any reason or for no reason, the motive of the employer being immaterial. The conclusion, however, that is sought to be drawn, is too broad. *The fact that the employment is at will of the parties,*

respectively, does not make it one at the will of others. The employee has manifest interest in the freedom of the employer to exercise his judgment without illegal interference or compusion, and by the weight of authority, the unjustified interference of third persons is actionable although the employment is at will."

D. *A Tort Action For Conspiracy is a "Proper Proceeding for Redress" Within the Meaning of 8 U. S. Code Sec. 43.*

This proposition is established by *Picking v. Pennsylvania R. Co.*, supra, wherein the Court said:

> "Congress gave a right of action sounding in tort to every individual whose federal rights were trespassed upon by any officer acting under pretense of state law. A field was created upon which a state officer could not tread without being guilty of trespass and liable in damages."

CONCLUSION

The Circuit Court of Appeals erred in affirming the District Court judgment that no basis for Federal jurisdiction existed herein.

It is therefore respectfully submitted that this cause is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

DATED November 10, 1953.

Respectfully submitted,

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IN THE

Supreme Court of the United States

FALL TERM, A. D. 1953

No. 462

S. L. KILGORE,

Petitioner,

VS.

ALFRED A. McKETHAN, ET AL.,

Respondents

Petition for Writ of Certiorari

BRIEF OF RESPONDENTS

I.

STATEMENT

Petitioner seeks review of a judgment of the Court of Appeals of the Fifth Circuit affirming an order of a District Court dismissing Petitioner's Complaint against the then Governor of Florida, the then members of the State Road Department as officials and as individuals, and named individuals not holding office, and corporations.

The complaint avers (1) that defendants (respondents) conspired to cause Florida Crushed Stone Company, by whom plaintiff (petitioner) was employed as sales manager of crushed rock to the State, to pay "kick-backs" to be used to reimburse contributors to the campaign fund of the Governor; (2) that the Governor, "by virtue of the power and authority vested in him by the Constitution and laws of the State of Florida, was able, from the time he assumed office, to dictate the policies to be followed by the State Road Department", (the Court judicially knows that there is no such authority); (3) that the Governor did dictate such policies and directed the Chairman of the Department to so operate that the Stone Company would be forced to pay a portion of its income from sales of rock to the Department, for the purpose of paying back some of the contributions which had been made by defendant Griffin and others to the Governor's campaign fund; (4) that petitioner opposed said plan; (5) that the members of the State Road Department set up an off-standard gradation requirement for cover material which they knew the Stone Company could not supply, in order to make them more receptive to the pay-off; and (6) that petitioner was discharged to his damage, for which he sues.

The Complaint does not invoke federal jurisdiction under Title 8, § 43 U. S. C. (tr. 1), but petitioner now invokes said section and bases his argument primarily thereon (br. page 3).

II.

DENIAL OF JURISDICTION

Federal jurisdiction was properly denied by the District Court and Court of Appeals, and no reason for review by this Court is shown because the facts averred do not bring the cause within any of the categories of the Fourteenth Amendment; or 8 U. S. C. § 43; 28 U. S. C. §§ 1343 or 1331, the only provisions cited by petitioner (br. 9).

It is not shown that:

(1) petitioner has been deprived "under color of statute, ordinance, regulation, custom or usage" of Florida "of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress provided for the equal protection of citizens";

(2) equal protection of the law has been denied the plaintiff, or that he has been deprived of property without due process of law;

(3) the discharge by the rock company of the petitioner as its employee was caused by state action, or action by respondents under color of law; or that

(4) a substantial federal question, or question worthy of discretionary consideration by this Court, is presented or involved.

III.

ARGUMENT

(1) State Action Necessary

The sole question presented by the petition for certiorari is whether the complaint states a case within the jurisdiction of the Federal District Court, and the foundation asserted as support for federal jurisdiction is Section 43, Title 8, U. S. Code, imposing civil liability upon every person who, under color of state law, subjects a citizen of the United States to deprivation of some right, privilege or immunity secured by the Constitution and laws of the United States. It clearly appears that the cause of action attempted to be stated in the complaint does not come within Section 43, Title 8.

The history and construction of Section 43, as related to the Fourteenth Amendment and to the provisions of the Civil Rights Act, leaves no doubt that Section 43 is confined and limited to those cases where some right secured to the citizen has been invaded by State action or action under color of state law. This is necessarily so because the Fourteenth Amendment does not purport to grant rights; it is a prohibition against state action which would deprive persons of life, liberty or property, without due process of law, or which would deny the equal protection of the laws.

The section of the Civil Rights Statutes specified in the complaint as the basis of plaintiff's right, is Section 47(3), Title 8, U. S. Code, not Section 43, now relied on. (Tr. 1.) Section 47(3) relates to cases where individuals have conspired to deny a citizen of his rights to equality or equal protection of the laws, and it is

settled that Section 47(3) is confined to cases involving equality. *Collins v. Hardyman,* 341 U. S. 651, 660, 71 S. Ct. 937, 941.

A comparison of the provisions of Section 43 and the provisions of Section 47(3) shows that the one deals with state action or action under the color of state law, whereas the other relates to conspiratorial action of individuals in the limited fields specified. The importance of confining each one of these statutes to its own sphere of operation, has been pointed out in numerous decisions (See *Yglesias v. Gulfstream Park Racing Association, Inc.* (5th Cir.) 201 F. 2d 817, 819, and cases there cited.)

The petitioner's failure to observe this distinction accounts for much of the confusion in his complaint and in his petition for certiorari.

Petitioner cites the due process and equal protection clauses of the Fourteenth Amendment as the basis of his claimed right to work, but nowhere does he claim that he has been denied equal protection of the laws. Because he does not claim denial of equality, Section 47 (3) could not apply. *Collins v. Hardyman,* supra.

Assuming, for purposes of argument, that Kilgore had a right to continue in his employment with the stone company, free from tortious interference by individuals or by official state action, it is obvious that a tortious interference by individuals, even by means of or pursuant to some conspiracy to interfere with or deprive him of his job, could not amount to a deprivation within the protection of Section 43, Title 8, because Section 43 is confined to State action or action under color of state law. (See *Watkins v. Oaklawn Jockey Club* (8th Cir.) 183 F. 2d 440, 443, and cases there cited.)

(2) State Action Not Shown

Searching the complaint for an allegation that the deprivation of which Kilgore complains was the result of state action or action under the color of state law, we find only the allegations contained in paragraph 7 that the defendant members of the State Road Department, acting under power and authority of the laws of the State of Florida, amended the specifications for road and bridge construction so as to set up an off-standard gradation requirement for cover materials which those defendants well knew the stone company could not supply, and which had the practical effect of shutting out the stone company, petitioner's employer, from bidding on some state road work, and that the purpose of closing specifications in this manner was to soften up the stone company and petitioner to make them more receptive to the pay-off arrangement purportedly alleged in other paragraphs (tr. 3 and 4).

Do those allegations show that the petitioner was, by the adoption of this regulation, deprived of any right secured to him by the Fourteenth Amendment or by Title 8, Section 43, U. S. Code?

Said regulation did not touch petitioner nor his right to work. The complaint alleges that, because of Kilgore's hostility to the alleged kick-back arrangement, "pressure was exerted by the defendants upon Henry Camp, President of the . . . Stone Company . . . to discharge plaintiff," and that "said dismissal was brought about as a part and parcel of the aforesaid continuing conspiracy among all of the defendants to this suit and the insistent demands upon Henry Camp by defendants that plaintiff be discharged." (tr. 6). Paragraph 12 alleges that each of the defendants "have conspired to deprive plaintiff of his right to engage in

the gainful employment which he held prior to the time of his unjustified dismissal as sales manager of . . . stone company, all in direct contravention of the provisions of the Constitution and Statutes of the United States." (tr. 6).

It appears, therefore, from the allegations of the complaint, that the claimed deprivation of Kilgore's right to continue in his employment by the stone company, resulted from a conspiracy by all of the defendants to deprive him of that right, not from any state action or action under color of law.

> "The jurisdiction conferred by the Civil Rights Act is narrowly limited. 8 USCA § 43."

Hague v. Committee for Industrial Organization, 307 U. S. 496, 59 S. Ct. 954.

Color of Law. Petitioner does not and could not cite any statute of Florida giving or appearing to give the Governor the power to direct the State Road Department to collect the alleged kick-back or to otherwise control said department. No such statute exists.

The Road Department, of course, had the power to change the specifications for surfacing materials, and it was its duty to do so if better construction could be thereby secured. For example, it is well known that penetration of water causes roads built of crushed stone to deteriorate, and if a better surfacing formula was devised to shed water, the department properly adopted it. But where, in the alleged circumstances, can there be found "color of statute" for the Governor, or the State Road Department, to cause the stone company to discharge the petitioner?

This Court, in *McCain v. City of Des Maines,* 174 U. S. 168, 19 S. Ct. 644, on page 646, says:

> " 'Color of law' does not mean actual law. 'Color', as a modifier, in legal parlance, means *'appearance,* as distinguished from reality.' Color of law means 'mere *semblance* of legal right.' Kin. Law Dict. & Gloss." (emphasis supplied)

This is the definition generally used. (See "Color of law", WORDS & PHRASES, Perm. Ed. Vol. 7-A, p 301.)

The words "appearance" and "semblance" are too well understood to require defining. Hence, if officers perform an act outside of any appearance or semblance of official power, such act is not under color of law. The discharge of the petitioner by the stone company falls in that class, even if officer defendants suggested that he be discharged. "Color of law" refers to official power, not personal persuasion. Moreover, there is a manifest lack of causal connection between the act of the Road Department in changing the specifications of surfacing materials, and the discharge of the petitioner by the stone company. The claim that it was necessary to procure petitioner's discharge in order to induce the stone company to contribute is too far-fetched, indirect and unreasonable to merit consideration. The whole situation considered, makes apropos the last paragraph of the opinion of *McCain v. City of Des Moines,* supra, namely:

> "The allegation that the suit arises under the Constitution of the United States is so palpably unfounded that it consitutes not even a color for the jurisdiction of the circuit court."

The cases cited in petitioner's brief beginning on page 29 headed "The Abuse and Misuse of State Conferred Power", etc., illustrate our point that the power

possessed by virtue of state law must be such as to give color or appearance of official power to perform the unlawful act complained of.

The leading case, *U. S. v. Classic,* 313 U. S. 299, 61 S. Ct. 1031, involved a fraudulent count and certification of votes by election officials between candidates for Congress. The officials had the power and duty to canvass the vote and certify the returns. Hence, when making the canvass they acted within their power, and when they falsified the returns they exceeded their power but acted under color of law.

In *Screws v. U. S.,* 325 U. S. 91, 65 S. Ct. 1031, a sheriff and policeman arrested a person and beat him so severely that he died. They had the statutory power to arrest and to make that arrest effective by using such force as necessary. Hence, by the use of unnecessary force, they exceeded their power but acted, nevertheless, under color of power (law). So with other cases in petitioner's brief.

This Court in *Harry Spalding v. William F. Vilas,* 161 U. S. 483, 40 L. Ed. 780, in considering lawful acts of the Postmaster General allegedly performed with malice, which deprived plaintiff of fees as an attorney, said:

> "As in the case of a judicial officer, *we recognize a distinction between action taken by the head of a department in reference to matters which are manifestly or palpably beyond his authority, and action having more or less connection with the general matters committed by law to his control . . .*" (P. 498) (emphasis supplied)

It was palpably beyond the authority of the Governor and members of the Road Department to interfere with petitioner's employment by the stone company, hence if they did interfere it was not under color of law.

Motive. The lawful acts of respondents were not made unlawful by a malicious motive, if such existed.

Harry Spalding v. William F. Vilas, supra

DesLauries v. Shea, et al., 13 N. E. 2d 932

Dalury v. Rezinas, 170 N. Y. S. 1045

The New York case defines conspiracy as—

". . . an agreement . . . to do an *unlawful* act."

IV.

PETITIONER'S BRIEF

The suit is for *damages* growing out of the alleged tortious conduct of respondents in procuring petitioner's employer to discharge him. The authorities hold that compensatory damages in such cases cannot be recovered unless the wrong complained of is the proximate cause of the injury alleged.

It is apparent, and we have demonstrated, that there is no causal connection between the alleged acts of the respondents and the alleged injury to the petitioner, and that the effort to connect them is too farfeched. Hence, no cause of action in the Federal Court is stated.

On page 11 of his brief, counsel says:

"Jurisdiction under 28 U. S. C. Section 1343 (3) clearly exists *if the complaint states a cause of action under 8 U. S. C. Section 43.*" (emphasis supplied)

We have demonstrated that no cause of action is shown because, among other reasons, state action or action under color of state law, has not been made to appear, and that Section 47 (3), Title 8, does not apply. We have shown that there has been no abuse or misuse of state-conferred power, but an alleged entire departure from such power or color thereof.

Petitioner says:

". . . the respondents who were state officials and employees misused their official powers to procure the dischrage of petitioner and *thus to insure* the collection of the kick back from his company by changing specifications" etc. (Br. p. 9) (emphasis supplied)

This statement summarizes petitioner's case and shows that he has no case.

If the stone company could be induced to discharge petitioner and pay the kick-backs, it would have paid without discharging petitioner if the stone company desired his further services. His discharge could not "insure" such payment, and manifestly was not the object of the alleged conspiracy.

A deluge of suits. For this Court to take jurisdiction of this cause would invite actions, appeals and petitions in causes without number. Many persons, aggrieved by discharge from employment—or having contract or imaginary civil rights violated—would be encouraged to appeal to the federal courts, including this Court, and from highest State Courts to this Court. In this case petitioner sued in the State Court also (tr. 7).

The field of due process, equal protection, and rights, privileges and immunities secured by the Constitution and laws of the United States is so broad and allows so much room for imagination, as to require a scrupulous screening of the cases presented to federal courts, and especially to this Court, in order to prevent total inundation of the federal judicial system.

CONCLUSION

We therefore submit that the petitioner does not present a case of substantial federal jurisdiction, or a case worthy of review by the highest court of the land, and that the petition should be denied (1) because it is without merit, and (2) under the discretionary power of this Court, even if some merit should appear.

Dated December 16, 1953.

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